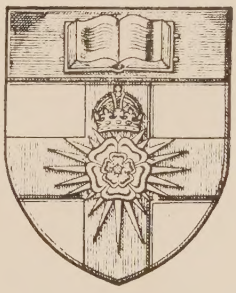
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

346.4 Mx. North Gallery



UNIVERSITY OF LONDON
LIBRARY

Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-exchequer-division_1868-1869_4

Edward B. Sumner
Lane Sem
1870

COUNCIL OF LAW REPORTING.

COUNCIL OF LAW REPORTING.

Members of the Council.

Chairman—Sir Roundell Palmer, Knt., M.P., Q.C.
Vice-Chairman—W. T. S. Daniel, Esq., Q.C.

EX-OFFICIO MEMBERS.

The Attorney-General, Sir R. P. Collier, Knt., M.P.
The Solicitor-General, Sir J. D. Coleridge, Knt., M.P.
The Queen's Advocate-General, Sir Travers Twiss, Knt.

ELECTED MEMBERS.

Mr. Serjeant O'Brien Mr. Serjeant Pulling	Serjeants' Inn.
Sir Roundell Palmer, Knt., M.P., Q.C. W. T. S. Daniel, Esq., Q.C.	Lincoln's Inn.
William Forsyth, Esq., Q.C. H. Warwick Cole, Esq., Q.C.	Inner Temple.
T. W. Greene, Esq., Q.C. John Gray, Esq., Q.C.	Middle Temple.
John A. Russell, Esq., Q.C. James Barstow, Esq.	Gray's Inn.
William Williams, Esq. (Firm—Messrs. Currie and Williams), Lincoln's Inn Fields W. S. Cookson, Esq. (Firm—Messrs. Cookson, Wainewright, & Co.), 6, New Square, Lincoln's Inn	Incorporate Law Society

Secretary—James Thomas Hopwood, Esq., 3, New Square, Lincoln's Inn.

THE

LAW REPORTS.

Court of Exchequer.

REPORTED BY

JAMES ANSTIE AND ARTHUR CHARLES,

BARRISTERS-AT-LAW.

EDITED BY

JAMES REDFOORD BULWER, Q.C.

VOL. IV.

FROM MICHAELMAS TERM, 1868, TO TRINITY TERM, 1869,

BOTH INCLUSIVE.

XXXII VICTORIA.

LONDON:

PRINTED FOR THE COUNCIL OF LAW REPORTING

BY WILLIAM CLOWES AND SONS,

DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.

PUBLISHING OFFICE, 51 CAREY STREET, LINCOLN'S INN, W.C.

1869.

BIBL. LONDIN UNIV.

JUDGES

OF

THE COURT OF EXCHEQUER,

XXXII VICTORIA.

The Right Hon. Sir Fitzroy Kelly, Knt., C.B.
Sir Samuel Martin, Knt.
Sir George William Wilshere Bramwell, Knt.
Sir William Fry Channell, Knt.
Sir Gillery Pigott, Knt.
Sir Anthony Cleasby, Knt.

ATTORNEYS GENERAL:

Sir John Burgess Karslake, Knt.
Sir Robert Porrett Collier, Knt.

SOLICITORS GENERAL:

Sir Richard Baggallay, Knt.
Sir John Duke Coleridge, Knt.

ERRATA.

Page		*Line*		*For*		*Read*
130	..	15 from top	..	"well," ..	..	"mill."
210	..	bottom line	..	"an act," ..	..	"one."
211	..	16 from top	..	"authority,"	..	"contract."
290	..	9 from bottom	..	"Channell, B."	..	"Cleasby, B."
291	..	16 from top	..	"Channell, B."	..	"Cleasby, B."
344	..	note (2)	..	"400*l.*" ..	..	"4*l.*"

TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

PAGE

Alexander *v.* Sizer 102
Avison, Eastwood *v.* 141

B.

Beeston, Isitt *v.* 159
British, &c., Company, General Steam Navigation Company, *v.* (Ex. Ch.) 238
Burrup, Lloyd *v.* 63
Bury Improvement Commissioners, Derby, Earl of *v.* 222

C.

Carew *v.* Duckworth 313
Carlisle, The Mayor, &c., of, *v.* Graham 361
Case *v.* Storey 319
Chapman *v.* Jones 273
Clarke, Southampton Steam Company *v.* 73
Climie *v.* Wood (Ex. Ch.) 328
Coaker, Pearse *v.* 92
Cohen, Gilpin *v.* 131
Commissioners of Sewers in London, Ferrer *v.* (Ex. Ch.) 1, 227
Copp, Stevens *v.* 20
Cory, Walker *v.* 152
Courtauld *v.* Legh 126, 187
Cox *v.* Lee 284
Craven *v.* Smith 146

D.

Davis *v.* Haycock 373
De Lancey's Succession, In the Matter of 345
Derby, Earl of, *v.* Bury Improvement Commissioners 222
Dickson *v.* The Neath and Brecon Railway Company 87
Dixon *v.* Wrench 154
Dorchester, Mayor, &c., of, *v.* Ensor 335
Duckworth, Carew *v.* 313

E.

East London Union, Guardians of, *v.* Metropolitan Railway Company 309
Eastwood *v.* Avison 141
Ecclesiastical Commissioners *v.* Merral 162
Ensor, Mayor, &c., of Dorchester *v.* 335

F.

Ferrar *v.* The Commissioners of Sewers in London (Ex. Ch.) 1, 227
Freeman *v.* Jeffries 189

G.

PAGE

General Steam Navigation Company *v.* The British, &c., Company (Ex. Ch.) 238
Gilpin *v.* Cohen 131
Godwin *v.* Stone 331
Graham, Mayor, &c., of Carlisle *v.* 361
Great Western Railway Company, Siner *v.* (Ex. Ch.) 117
Greenwood, In re 327
Gregson, Mody *v.* (Ex. Ch.) 49
Guardians of The East London Union *v.* Metropolitan Railway Company 309

H.

Harding *v.* Inskip 80
Harrop *v.* Hirst 43
Harvey *v.* The Mayor, &c., of Lyme Regis 260
Haycock, Davis *v.* 373
Hayward, Thomas *v.* 311
Higgs *v.* The Northern Assam Tea Company 387
Hirst, Harrop *v.* 43
Hodkinson, Popplewell *v.* (Ex. Ch.) 248
Holmes *v.* North Eastern Railway Company 254
Hopkins *v.* Ware 268

I.

Inskip, Harding *v.* 80
Isitt *v.* Beeston 159

J.

Jeffries, Freeman *v.* 189
Jelley, Wright *v.* 9
Johnson *v.* Osenton 107
Jones, Chapman *v.* 273

L.

Lee, Cox *v.* 284
Legh, Courtauld *v.* 126, 187

PAGE

Lewis *v.* M'Kee (Ex. Ch.) 58
Lloyd *v.* Burrup 63
Lyme Regis, Mayor, &c., of, Harvey *v.* 260

M.

M'Kee, Lewis *v.* (Ex. Ch.) 58
Massey *v.* Sladen 13
Maule, Spill *v.* (Ex. Ch.) 232
Maxted *v.* Paine 81
——————— (Second Action) 203
Merral, Ecclesiastical Commissioners *v.* 162
Metropolitan Board of Works, Wheeler *v.* 303
Metropolitan Railway Company, Guardians of East London Union *v.* 309
Mody *v.* Gregson (Ex. Ch.) 49
Mossman, Winn *v.* 292

N.

Neath and Brecon Railway Company, Dickson *v.* 87
North Eastern Railway Company, Holmes *v.* 254
Northern Assam Tea Company, Higgs *v.* 387

O.

Osenton, Johnson *v.* 107

P.

Paine, Maxted *v.* 81
——————— (Second Action) 203
Parkes *v.* Prescott (Ex. Ch.) 169
Pearse *v.* Coaker 92
Perry, Executors of, *v.* Regina 27
Popplewell *v.* Hodkinson (Ex. Ch.) 248
Prescott, Parkes *v.* (Ex. Ch.) 169

R.

	PAGE
Regina, Perry *v.* Executors of	27
Ryder *v.* Wombwell (Ex. Ch.)	32

S.

Siner *v.* The Great Western Railway Company (Ex. Ch.)	117
Sizer, Alexander *v.*	102
Sladen, Massey *v.*	13
Smith, Craven *v.*	146
Southampton Steam Colliery Company *v.* Clarke	73
Spill *v.* Maule (Ex. Ch.)	232
Stevens *v.* Copp	20
Stone, Godwin *v.*	331
Storey, Case *v.*	319

T.

Thomas *v.* Hayward	311

W.

Walker *v.* Cory	152
Ware, Hopkins *v.*	268
Wheeler *v.* The Metropolitan Board of Works	303
Winn *v.* Mossman	292
Wombwell, Ryder *v.* (Ex. Ch.)	32
Wood, Climie *v.* (Ex. Ch.)	328
Wrench, Dixon *v.*	154
Wright *v.* Jelley	9

TABLE OF CASES CITED.

A.

		PAGE
Acton *v.* Blundell	12 M. & W. 324	250
Adams *v.* Kelly	Ry. & Mood. 157	174, 178, 181, 186
Aggs *v.* Nicholson	1 H. & N. 165	104, 106
Agra and Masterman's Bank *v.* Leighton	Law Rep. 2 Ex. 56	193
Alexander *v.* Birchfield	7 M. & G. 1061	269, 270, 314
Ames *v.* Colnaghi	Law Rep. 3 C. P. 359	332
Annapolis, The	1 Lush. 295	247
Anon.	1 Dowl. 157	133, 138
———	3 Salk. 85	275
Arden *v.* Sullivan	14 Q. B. 832	163
Arnold *v.* Mayor of Poole	4 M. & G. 896	168
Asher *v.* Whitlock	Law Rep. 1 Q. B. 1	277
Aslin *v.* Parkin	2 Burr. 665	94, 97
Astle *v.* Thomas	2 B. & C. 271	69
Attorney-General *v.* Brunning	8 H. L. 243	29, 30
——— *v.* Case	3 Price, 302	243
——— *v.* Lord Lonsdale	Law Rep. 7 Eq. 377	363
Austin's Case	1 Ventr. 189	45
Ayrey *v.* Fearnsides	4 M. & W. 168	286, n.

B.

Bahia, &c., Railway Company	Law Rep. 3 Q. B. 584	393
Bailiffs of Tewkesbury *v.* Bricknell	2 Taunt. 120	337
——— *v.* Diston	6 East, 438	337
Bainbridge *v.* Pickering	2 Wm. Bl. 1325	36, 42
Bamford, Roe d., *v.* Hayley	12 East, 464	23
Barclay, Ex parte	5 D. M. & G. 403	329
Bartlett *v.* Dimond	14 M. & W. 49	69
Bateman *v.* Mid-Wales Railway Company	Law Rep. 1 C. P. 499	103
Beadel *v.* Eastern Counties Railway Company	2 C. B. (N. S.) 509	326
Beadsworth *v.* Torkington	1 Q. B. 782, 791	340
Beckett *v.* Midland Railway Company	Law Rep. 1 C. P. 241; Law Rep. 3 C. P. 82	5, 192
Belcher, Ex parte	2 Mont. & A. 160	329
——— *v.* Magnay	12 M. & W. 102	161
Bermingham *v.* Sheridan	33 Beav. 660	378
Berrolles *v.* Ramsey	Holt, N. P. 77	35

		PAGE
Beverley *v.* Lincoln Gaslight Company	6 Ad. & E. 840	168
Bickerdike *v.* Bollman	1 T. R. 405	315
Bigge *v.* Parkinson	7 H. & N. 955	53
Birkenhead Docks *v.* Laird	4 De G. M. & G. 732	224
Birks *v.* Trippet	1 Wm. Saund. 33, 33 a	193
Blackhan *v.* Doren	2 Camp. 503	314, 315
Blakely Ordnance Company, Re	Law Rep. 3 Ch. App. 154	393, 395
Bluett *v.* Osborne	1 Stark. 384	49
Bogg *v.* Pearse	10 C. B. 534	68
Bonomi *v.* Backhouse	E. B. & E. 622	251
Bos *v.* Helsham	Law Rep. 2 Ex. 72	192
Boulter *v.* Crowther	2 B. & C. 703	229
Bowcher *v.* Noidstrom	1 Taunt. 568	240, 242
Bower *v.* Hill	1 Scott, 526	45, 47
Boyd *v.* Shorrock	Law Rep. 5 Eq. 72	329
Boydell *v.* Jones	4 M. & W. 446	287
Bradley *v.* Cartwright	Law Rep. 2 C. P. 511	143
Braun *v.* Weller	Law Rep. 2 Ex. 183	80
Brayshaw *v.* Eaton	7 Scott, 183	35, 36, 42
Brecon, Mayor of, *v.* Edwards	1 H. & C. 51	337
Bree *v.* Holbech	2 Dougl. 655	193
Brierly *v.* Kendall	17 Q. B. 937	17
British Cast Plate Manufacturers *v.* Meredith	4 T. R. 794	230
Broadbent *v.* Imperial Gaslight Company	7 D. M. & G. 436	229, 230, 231
Brooker *v.* Scott	11 M. & W. 67	41
Brown *v.* Edgington	2 M. & G. 279	49
—— *v.* Nicholson	28 L. J. (M.C.) 49	296
Brudenell *v.* Elwes	1 East, 442; 7 Vest. 382	145
Buxton *v.* Bateman	Sid. 88, 201	277, 278
Byerley *v.* Windus	5 B. & C. 1	277

C.

Calcraft *v.* Thompson	15 W. R. 387	127
Caledonian Railway Company *v.* Sprott	2 Macq. 449	250
Callans *v.* Sherry	Alc. & Nap. 125	133, 136, 138, 140
Candlish *v.* Simpson	1 B. & S. 357	296
Cane *v.* Chapman	5 A. & E. 647	69
Capel *v.* Buszard	6 Bing. 150	277
Capper *v.* Forster	3 Bing. N. C. 938	76, 79
Carruthers *v.* Sydebotham	4 M. & S. 77	243
Caulfield *v.* Whitworth	18 L. T. (N. S.) 527	235
Chandos, Marquis of, *v.* Inland Revenue Commissioners	6 Eq. 464	328
Chanter *v.* Hopkins	4 M. & W. 399	49
Chasemore *v.* Richards	7 H. L. C. 349	250
Chaworth *v.* Phillips	Moore, 876	24
Chichester *v.* Bickerstaff	2 Vern. 295	359
Christopherson *v.* Lotinga	15 C. B. (N. S.) 809	88, 89
Churton *v.* Frewen	Law Rep. 2 Eq. 634	275, 278, 279
Clarke *v.* Williams	3 H. & C. 1001	10
Clifford *v.* Wicks	1 B. & A. 498	277
Cobbett, Ex parte	7 E. & B. 955	132, 134
Cockrane *v.* Green	9 C. B. (N. S.) 448	393
Cole *v.* Davies	Ld. Raym. 724	160
Coles *v.* Bristowe	Law Rep. 4 Ch. App. 3	84, 85, 86, 208, 209, 214, 376, 385

		PAGE
Collison *v.* Lettsom	6 Taunt. 224	24
Congleton, Mayor of, *v.* Pattison	10 East, 130	23, 311
Conservators of the Thames *v.* Hall	Law Rep. 3 C. P. 415	224, 241
Cook *v.* Deaton	3 C. & P. 114	35
Cooke *v.* Wildes	5 E. & B. 328	234
Corvin's Case	12 Rep. 105	278
Cory *v.* Scott	3 B. & A. 619	314, 315
Cotton, Ex parte	2 M. D. & D. 725	329
—— *v.* James	1 Moo. & M. 273	159, 160, 161
Courtauld *v.* Legh	Law Rep. 4 Ex. 126	188
Cowles *v.* Potts	34 L. J. (Q.B.) 247	235
Cowley's Succession, In re Earl	Law Rep. 1 Ex. 288	328
Cox *v.* Prentice	3 M. & S. 344	192
Crafter *v.* Metropolitan Railway Company	Law Rep. 1 C. P. 300	119
Cragg *v.* Taylor	Law Rep. 2 Ex. 131	154, 155, 156, 157, 158
Croft *v.* Lumley	5 E. & B. 682; 6 H. L. C. 672	60
Crossley *v.* Lightowler	Law Rep. 3 Eq. 279; Law Rep. 2 Ch. 478	363
Cruse *v.* Paine	Law Rep. 4 Ch. 441; Law Rep. 6 Eq. 641	207, 209, 214, 382

D.

Davison *v.* Gent	1 H. & N. 744	277
Day *v.* Beddingfield	Noy, 104	277
Deacon *v.* Stodhart	2 M. & G. 317	153
Dean and Chapter of Rochester *v.* Pierce	1 Camp. 466	163, 168
Dennis *v.* Morrice	3 Esp. 158	315
Devaux *v.* Conolly	8 C. B. 640	193
Dew *v.* Parsons	2 B. & A. 562	198
Diana, The	1 Wm. Rob. 131	242
Dickson *v.* Swansea Vale Railway Company	Law Rep. 4 Q. B. 44	393, 396
Dignam *v.* Baily	Law Rep. 3 Q. B. 178	333
Dodds *v.* Embleton	9 D. & R. 27	244
Dodwell *v.* Gibbs	2 C. & P. 615	97
Doe d. Bridgman *v.* David	1 C. M. & R. 405	23
—— *v.* Filliter	13 M. & W. 47	96
—— d. Griffith *v.* Pritchard	5 B. & Ad. 765	22
—— *v.* Harvey	8 Bing. 239	97
—— d. James *v.* Stanton	2 B. & A. 371	97
—— d. Pennington *v.* Taniere	12 Q. B. 998	164
Dommett *v.* Beckford	5 B. & Ad. 521	60
Drake *v.* The Attorney-General	10 C. & F. 257	29
Dudley *v.* Warde	Amb. 113	329

E.

Earl of Auckland, The	1 Lush. 164	247
Earl of Lonsdale *v.* Littledale	2 H. Bl. 267	251
East *v.* Twyford	9 Hare, 713, 730, n.	349
Edwards *v.* Lowndes	1 E. & B. 81	68
Elder *v.* Beaumont	8 E. & B. 353	11, 12
Elliot *v.* North Eastern Railway Company	10 H. L. C. 333; 1 J. & H. 145	251, 253
Ellis *v.* Mayor of Bridgnorth	15 C. B. (N. S.) 52	311
Embrey *v.* Owen	6 Ex. 353	45
Emmerton *v.* Matthews	7 H. & N. 586	49

		PAGE
European Central Railway Company *v.* Westall	Law Rep. 1 Q. B. 167	11
Everett *v.* Collins	2 Camp. 515	269
Eyre *v.* Archer	16 C. B. (N.S.) 638	10

F.

Few *v.* Perkins	Law Rep. 2 Ex. 92	226
Fineux *v.* Hovenden	Cro. Eliz. 664	45, 46
Fisher *v.* Dixon	12 Cl. & F. 312	330
Fishery Case, The	Davy's Rep. p. 55	363
Fitzgerald *v.* Champneys	2 J. & H. 31	224
Fletcher *v.* Ashburner	1 Bro. C. C. 497	352
Foley, Lord, *v.* Inland Revenue Commissioners	Law Rep. 3 Ex. 263	328
Ford *v.* Fothergill	1 Esp. 211	35
Fordham *v.* London, Brighton, and South Coast Railway Company	Law Rep. 3 C. P. 368	119
Forman *v.* Wright	11 C. B. 481	193
Foster *v.* Redgrave	Law Rep. 4 Ex. 35, note (8)	35, 42
Foster's Case	11 Rep. 63 a., b.	224
Foy *v.* London, Brighton, and South Coast Railway Company	18 C. B. (N.S.) 225	117, 119, 121 122, 124, 125
Francis *v.* Ley	Cro. Jac. 366	277
Fray *v.* Fray	17 C. B. (N.S.) 603	286, 287
Frederick *v.* Aynscombe	1 Atk. 392	353
Fryer *v.* Kinnersley	15 C. B. (N.S.) 422	235
Fuller *v.* Lane	2 Add. 419	275, 279

G.

Galloway *v.* Mayor of London	Law Rep. 1 H. L. 34	305
Gardiner *v.* Gray	4 Camp. 144	52
General Estates Company, Re	Law Rep. 3 Ch. 758	393, 395
Gilpin *v.* Fowler	9 Ex. 615	234
Gill's Conveyance, In re	8 Ex. 380, n.	328
Goldson *v.* Buck	15 East, 372	224
Goodright *v.* Dunham	1 Dougl. 264	143
Goodwin *v.* Jordon	1 A. & E. 378	132, 133, 140
Gorton *v.* Gregory	3 B. & S. 90	311
Goupy *v.* Harden	7 Taunt. 159	103
Grant *v.* Norway	10 C. B. 665	60
Gray *v.* West	Law Rep. 4 Q. B. 175	146, 148, 151
Greene *v.* Chester	2 Rolle, 144	34
Griffen *v.* Deighton	5 B. & S. 93, 108	276
Griffith, Doe d. *v.* Pritchard	5 B. & Ad. 765	22
Griffiths *v.* London and North Western Railway	14 L. T. (N.S.) 797	256
Grissell *v.* Bristowe	Law Rep. 3 C. P. 112; Law Rep. 4 C. P. 36	84, 85, 86, 204, 208 209, 218, 220, 376, 382, 385, 386
Gumm *v.* Fowler	2 E. & E. 890	187, 188

H.

Hall *v.* Wallace	7 M. & W. 353	161
Halley, The	Law Rep. 2 P. C. C. 193	243

		PAGE
Hammond *v.* Colls	1 C. B. 916	22
——— *v.* Dufrene	3 Camp. 145	314
Hands *v.* Slaney	8 T. R. 578	36
Harding *v.* Greene	1 Moore, 477	175
Hare *v.* Hyde	16 Q. B. 394	131, 133, 136, 138, 139, 140
Harpur's Case	11 Rep. 23, a.	277
Harrold *v.* Great Western Railway Company	14 L. T. (N. S.) 440	119, 124
Hartley *v.* Pehall	Peake, 131	23
Hawkins *v.* Maltby	Law Rep. 6 Eq. 505	378
Hayford *v.* Benlows	Amb. 581	350
Healey *v.* Story	3 Ex. 3	103, 105
Herbert *v.* Laughluyn	Cro. Car. 492	364
Hillingsworth *v.* Brewster	1 Salk. 256	277
Hinde *v.* Chorlton	Law Rep. 2 C. P. 104	277
Hirst *v.* Tolson	2 Mac. & G. 134	194
Hoare *v.* Silverlock	12 Q. B. 624	286, 287
Hobson *v.* Cowley	27 L. J. (Ex.) 205	60
——— *v.* Todd	4 T. R. 71	45
Hockley *v.* Mawbey	1 Ves. jun. 142	143
Hodgkinson *v.* Kelly	Law Rep. 6 Eq. 496	378, 381
Holford *v.* Bailey	13 Q. B. 426	363
Hooper *v.* Clark	Law Rep. 2 Q. B. 200	23, 311
Hopkins *v.* Ware	Law Rep. 4 Ex. 268	314
Hopkinson *v.* Puncher	3 Ex. 95	68
Huggins *v.* Wiseman	Carth. 110	35
Hull and Selby Railway Company, In re	5 M. & W. 327	364
Humphries *v.* Brogden	12 Q. B. 742	250, 251
Hunter *v.* Britts	3 Camp. 455	96
——— *v.* Galliers	2 T. R. 133	23, 24

I.

Indermaur *v.* Dames	Law Rep. 2 C. P. 311	255
Ipstones Park Iron Ore Company, Limited, *v.* Pattinson	2 H. & C. 828	10, 12
Ive *v.* Chester	Cro. Jac. 560	34
—— *v.* Scott	9 Dowl. 993	92, 97, 98

J.

Jackson *v.* Hopperton	16 C. B. (N. S.) 829	234
Jacobs *v.* Jacobs	3 Dowl. 675	133
James *v.* Great Western Railway Company	Law Rep. 2 C. P. 634 (n.)	119
Jeffryes *v.* Agra Bank	Law Rep. 2 Eq. 674	393, 395
Jewell *v.* Parr	13 C. B. 916	39
Johnson *v.* Johnson	3 Hare, 157	29
Jones *v.* Just	Law Rep. 3 Q. B. 197	52, 56
—— *v.* Morris	6 B. & S. 198	10
Josling *v.* Kingsford	13 C. B. (N. S.) 447	56
Jourdain *v.* Wilson	4 B. & A. 266	23

K.

Kelly *v.* Barnwell	Cook. & Alc. 94	138
Kemble *v.* Mills	1 M. & G. 757	315, 318

		PAGE
Keppel *v.* Bailey	2 My. & K. 517	24
Killarney, The	1 Lush. 427	242, 247
King *v.* Bowen	8 M. & W. 625	192
—— *v.* Gillett	7 M. & W. 55	60
Kingsford *v.* Great Western Railway Company	16 C. B. (N. S.) 761	88, 89

L.

Lacharme *v.* Quartz Rock Mariposa Gold Mining Company	1 H. & C. 184	88, 89, 91
Laird *v.* Pim	7 M. & W. 474	310
Laugher *v.* Pointer	5 B. & C. 547	240
Laws *v.* Rand	27 L. J. (C.P.) 76	269
Lawton *v.* Lawton	3 Atk. 13	329
—— *v.* Salmon	1 H. Bl. 259 (n.)	329
Leadbitter *v.* Farrow	5 M. & S. 345	103, 105
Leader *v.* Moxton	3 Wils. 461	230
Leak *v.* Howel	Cro. Eliz. 563	265
Lechmere *v.* Earl of Carlisle	3 P. Wms. 221	329
—— *v.* Lechmere	Cases temp. Talbot, 80	329
Leeds *v.* Burrowes	12 East, 1	192
Legge *v.* Thorpe	2 Camp. 310	314
Leonard *v.* Robinson	5 E. & B. 125	103
Lewin *v.* Edwards	9 M. & W. 720	286, n.
Lindus *v.* Melrose	2 H. & N. 293; 3 H. & N. 177	104, 106
Lister *v.* Lobley	7 A. & E. 124	227
Litchfield *v.* Ready	5 Ex. 939	94
Lloyd *v.* Harrison	Law Rep. 1 Q. B. 502	332
London, Mayor of, *v.* St. Andrew's Holborn	Law Rep. 2 C. P. 574	305, 306
Lonsdale, Earl of, *v.* Littledale	2 H. Bla. 267	251
Lord *v.* Hall	8 C. B. 627	110
Lord Fevey *v.* Inland Revenue Commissioners	Law Rep. 3 Ex. 266	328
Lord Saltoun *v.* Lord Advocate General	3 Macq. 659	349, 351
Lousley *v.* Hayward	1 Y. & J. 583	277
Lucas *v.* How	Sir T. Raym. 250	24
Lucey *v.* Ingram	6 M. & W. 302	242, 243, 247
Lyde *v.* Russell	1 B. & Ad. 394	330

M.

Machell *v.* Weeding	8 Sim. 4	142
Mainwaring *v.* Giles	5 B. & A. 356	277, 280
Malcolmson *v.* O'Dea	10 H. L. 618	364
Manby *v.* Witt	18 C. B. 544	235
Mangles *v.* Dixon	3 H. L. C. 702	393, 396
Mant *v.* Collins, cited in Wood *v.* Hewitt	8 Q. B. 913	329
Mare *v.* Charles	5 E. & B. 978	103, 104
Maria, The	1 Wm. Rob. 95, at p. 99	243
Marsh *v.* Pedder	4 Camp. 257	269
Marshall *v.* Corporation of Queenborough	1 Sim. & St. 520	144
—— *v.* Ulleswater Steam Navigation Company	3 B. & S. 732	363

		PAGE
Martin *v.* Goble	1 Camp. 323	127, 128, 130
Marzetti *v.* Williams	1 B. & Ad. 415	45
Matthew *v.* Osborne	13 C. B. 919	97
Maxted *v.* Paine	Law Rep. 4 Ex. 205	375
Mellor *v.* Spateman	1 Wms. Saund. 346, a.	45, 46
Micklethwaite, In re	11 Ex. 452	328
Milligan *v.* Wedge	12 A. & E. 737	240, 242
M'Kone, In re	Ir. Circ. Rep. 65	133
Montague *v.* Harrison	3 C. B. (N. S.) 292	132, 137, 139
Moore *v.* Rawson	3 B. & C. 332	127
Morgan, Ex parte	1 D. J. & S. 288	110
Mosley *v.* Chadwick	7 B. & C. 47, note	342
Murphy *v.* Ryan	2 Ir. Rep. C. L. 143	363, 367

N.

Natal Investment Company, In re	Law Rep. 3 Ch. 355	393, 395
Neptune the Second	1 Dodson, 467	243
Newcastle, Duke of, *v.* Clark	8 Taunt. 602	277
Nichols *v.* Diamond	9 Ex. 154	103, 104
——— *v.* Godts	10 Ex. 191	56
Nicholson *v.* Lancashire and Yorkshire Railway Company	34 L. J. (Ex.) 84	255, 257
North Eastern Railway Company *v.* Elliot	1 J. & H. 145; 10 H. L. C. 333	251, 253
North London Railway Company *v.* Metropolitan Board of Works	John. 405	305
Nowell *v.* Roake	7 B. & C. 404	96
Nunn *v.* Fabian	Law Rep. 1 Ch. 34	165

O.

O'Flaherty *v.* M'Dowell	6 H. L. C. 142	224
Orr *v.* Maginnis	7 East, 359	315
Owenson *v.* Morse	7 T. R. 64	269

P.

Pardoe *v.* Price	16 M. & W. 451	68
Parkinson *v.* Lee	2 East, 314	54, 55
Parmiter *v.* Coupland	6 M. & W. 105	286, 290
Parsons *v.* Hind	14 W. R. 860	329
Pearson *v.* Pearson	Law Rep. 1 Ex. 308	111
Peters *v.* Fleming	6 M. & W. 42	38, 41
Pickard *v.* Sears	6 Ad. & E. 469	393
Pindar *v.* Wadsworth	2 East, 154	45
Platt *v.* Routh	6 M. & W. 756	29
Puckford *v.* Maxwell	6 T. R. 52	269
Pultency *v.* Earl of Darlington	1 Bro. C. C. 223	358, 359, 360
Purfrey's Case	Moore, 243	24

Q.

Quarman *v.* Burnett	6 M. & W. 499	240
Quincey, Ex parte	1 Atk. 477	329

R.

		PAGE
Rainsford *v.* Fenwick	Carter, 215	34
Rawlings, Ex parte	1 D. J. & S. 225	115
Rawson *v.* Samuel	1 Cr. & Ph. 161	393
Reigate, Mayor of, *v.* Hart	Law Rep. 3 Q. B. 244	295, 298, 300, 301
Rennell *v.* Bishop of Lincoln	7 B. & C. 113	277
Rex or Regina:		
—— *v.* Amos	2 B. & A. 533	295, 298
—— *v.* Berry	4 T. R. 217	181
—— *v.* Cooper	8 Q. B. 533	174, 175, 179, 181, 182, 185
—— *v.* Dale	Dears. C. C. 37	295, 296, 297, 298, 301
—— *v.* Mayor of London	Law Rep. 2 Q. B. 292	9, 229
—— *v.* McLaughlin	Alc. & Nap. 130	138
—— *v.* Old Alresford	1 Tr. 358	363
—— *v.* Priddle	Tidd's Pract. vol. 1, p. 196 (9th ed.)	133
—— *v.* Thrower	1 Ventr. 208; 3 Keb. 28	45
—— *v.* Wigley	7 C. & P. 4	133
Richardson *v.* Gifford	1 Ad. & E. 52	163
Rickett *v.* Metropolitan Railway Company	Law Rep. 2 H. L. 175	311
Robinson *v.* Hawksford	9 Q. B. 52	269, 270, 315
——— *v.* Read	9 B. & C. 449	269
Rochester, Dean and Chapter of, *v.* Pierce	1 Camp. 466	163, 168
Roe *d.* Hunter *v.* Galliers	2 T. R. 133	23, 24
Roper *v.* Holland	3 A. & E. 99	69
Rossi *v.* Bailey	Law Rep. 3 Q. B. 621	11, 333
Rudge *v.* Bowman	Law Rep. 3 Q. B. 689	378
Ryall *v.* Rowles	2 White & Tudor, L. C. 2nd ed. 615	393
Ryder *v.* Wombwell	Law Rep. 3 Ex. 90; Law Rep. 4 Ex. 33	32, 33

S.

Sadler *v.* Cleaver	7 Bing. 769	81
Saltoun, Lord, *v.* Lord Advocate General	3 Macq. 659	349, 351
Sampson *v.* Hoddinott	1 C. B. (N.S.) 590	45, 130
Shephard *v.* De Bernales	13 East, 565	60
Shepherd *v.* Pybus	3 M. & G. 868	49
Sheppard *v.* Murphy	Ir. Rep. 2 Eq. 544	209, 384, 385, 386
Smith *v.* Mercer	Law Rep. 3 Ex. 51	270
Somerset, Duke of, *v.* Fogwell	5 B. & C. 875	363, 364
Southcote *v.* Stanley	1 H. & N. 247	256
Southwark Bridge Company *v.* Sills	2 C. & P. 371	163
Spencer's Case	5 Co. 16; 1 Smith's L. C. 6th ed. 45, 51	23, 25, 311, 312
Spyer, Ex parte	1 D. J. & S. 318	111
Stafford, Mayor of, *v.* Till	4 Bing. 75, 77	163, 167
Staffordshire Banking Company *v.* Emmott	Law Rep. 2 Ex. 208	333, 334
Standish *v.* Ross	3 Ex. 527	194
Steedman *v.* Rose	Car. & M. 422	35
Stettin, The	Brow. & Lush. 199, 202	247
Stevens' Hospital *v.* Dyas	15 Ir. Ch. 405, 420	164, 166

		PAGE
Story *v.* Perry	4 C. & P. 526	35
Street *v.* Morgan	(Not reported)	384
Stubley *v.* London and North Western Railway Company	Law Rep. 1 Ex. 13	119
Sumner *v.* Bromilow	34 L. J. (Q.B.) 130	329
Sutton, Ex parte	2 Cox. 84	110
Swatman *v.* Ambler	8 Ex. 72	164
Sweetapple *v.* Bindon	2 Vern. 536	353
Symons *v.* George	3 H. & C. 996	110, 111, 114

T.

Tapling *v.* Jones	11 H. L. C. 290	127, 130
Tatem *v.* Chaplin	2 H. Bl. 133	311
Temora, The	1 Lush. 17	247
Tewkesbury, Bailiffs of, *v.* Bricknell	2 Taunt. 120	337
——————, *v.* Diston	6 East, 438	337
Thackray *v.* Blackett	3 Camp. 164	315
Thatcher, Ex parte	Law. Rep. 2 Ch. App. 93	10, 11
Ticonderoga, The	Swab. 215	242
Tilson *v.* Warwick Gaslight Company	4 B. & C. 962	69
Toms *v.* Wilson	4 B. & S. 455	16, 17
Toogood *v.* Spyring	1 C. M. & R. 181	233
Toomey *v.* London and Brighton Railway Company	3 C. B. (N. S.) 146, 150	39, 119
Torrington *v.* Lowe	Law Rep. 4 C. P. 26	209
Trappes *v.* Harter	2 C. & M. 153	329
Tregonwell *v.* Lord Sydenham	Dowl. H. L. 194	350
Turner *v.* Cameron's Coalbrook Steam Coal Company	5 Ex. 932	94
Tyne Improvement Commissioners *v.* General Steam Navigation Company	Law Rep. 2 Q. B. 65	241, 243

V.

Van Toll *v.* South Eastern Railway Company	12 C. B. (N. S.) 75	60, 61
Vernon *v.* Smith	5 B. & A. 1	23
Vyse *v.* Wakefield	6 M. & W. 442	193
Vyvyan *v.* Arthur	1 B. & C. 410	22

W.

Waddington *v.* Roberts	Law Rep. 3 Q. B. 579	95
Waddy *v.* Newton	8 Mod. 276	364
Walmsley *v.* Milne	7 C. B. (N. S.) 115	330
Warren *v.* Peabody	8 C. B. 800	76, 79
Watson *v.* Mid-Wales Railway Company	Law Rep. 2 C. P. 593	393, 396
Westbury *v.* Powell	Cro. Eliz. 664	45, 46
Wharton *v.* Mackenzie	5 Q. B. 606	41
Wheelton *v.* Hardisty	8 E. & B. at p. 262	39
Wheldale *v.* Partridge	8 Ves. 235	352, 359
Wieler *v.* Schilizzi	17 C. B. 619	49

		PAGE
Wilkinson *v.* Godefroy	9 A. & E. 536	193, 201
——— *v.* Kirby	15 C. B. 430	94
Williams *v.* Earle	Law Rep. 3 Q. B. 739	22
——— *v.* Steele	4 Ir. Law Recorder, 169	138
Wilmot *v.* Corporation of Coventry	1 Y. & C. 518	164
Wilson *v.* Townend	30 L. J. (Ch.) 25	127
Wiltshire *v.* Willett	31 L. J. (M.C.) 8	337
Wing *v.* Tottenham and Hampstead Junction Railway Company	Law Rep. 3 Ch. App. 740	310
Winter *v.* Winter	5 Hare, 306	29
Wittingham *v.* Hill	Cro. Jac. 494	34
Wood *v.* Hewett	8 Q. B. 913	329
——— *v.* Tate	2 B. & P. (N. R.) 247	162, 164, 166, 167, 168
——— *v.* Waud	3 Ex. 748	45
Wright *v.* Woodgate	2 C. M. & R. 573	234

Y.

Yard *v.* Ford	2 Wm. Saund. 172	337, 343
Yates *v.* Jack	Law Rep. 1 Ch. 295	127
York, Newcastle, and Berwick Railway Company *v.* Crisp.	23 L. J. (C.P.) 125	60, 61

CASES

DETERMINED BY THE

COURT OF EXCHEQUER

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

MICHAELMAS TERM, XXXII VICTORIA.

FERRAR *v.* THE COMMISSIONERS OF SEWERS IN THE CITY OF LONDON.

1868
Nov. 16.

Compensation—Public Works—Lands Clauses Consolidation Act, 1845 (8 *Vict.* c. 18), s. 68—*City of London Sewers Act*, 1848 (11 & 12 *Vict. c. clxiii.*)

6 Q B 574

In raising the level of a street under the City of London Sewers Act, 1848, the defendants, the Commissioners of Sewers, injuriously affected the plaintiff's premises. The act (s. 2) incorporates the Lands Clauses Consolidation Act, 1845, the 68th section of which gives compensation to persons whose lands are injuriously affected; but s. 3 excludes the operation of the provisions of the Lands Clauses Act relating (amongst other things) to "the purchase and taking of lands otherwise than by agreement," and those words are the descriptive heading of ss. 16—68 of the Lands Clauses Act. No compensation was given by the special act for the injurious affecting of lands, but compensation was provided in certain special cases of injury to and interference with property, which was to be assessed by justices:—

Held, that s. 3 of the special act excluded only those provisions of the Lands Clauses Act, which, in fact, related to the taking and purchase of land otherwise than by agreement, and not all the sections under that heading; and that plaintiff was entitled to compensation under s. 68 of the Lands Clauses Act.

Revd in Ex Ch. post 227.

SPECIAL case.

The defendants, under the City of London Sewers Act, 1848 (11 & 12 Vict. c. clxiii.), s. 120, raised the road and pavement of

1868

FERRAR v. COMMISSIONERS OF SEWERS OF LONDON.

Liverpool street, in the city of London. On one side of the street stood the Railway Tavern and Hotel, a public house of which the plaintiff was lessee for thirty-one years from Michaelmas, 1863. The house had three doors, two leading to the first bar, and one to the second; in consequence of the alteration, the two first-mentioned doors, of which the one was formerly approached by a step up, and the other was on a level, are now both approached by two steps down, and the third door, which formerly had five steps up, has now only three. For the purposes of the case it was admitted that the new mode of access was less convenient than the old, and that the change made the premises less valuable as a public house. The plaintiff was also obliged to make a new cellar flap, grating, and window board, and to make certain alterations to enable him to receive beer barrels from the street in the same manner as he had formerly done, and had a right to do. The access to plaintiff's house was also interfered with during and in consequence of the proper execution of the works opposite to his house. And for the purposes of the case it was also admitted that the house was injured in appearance, the bar overlooked by passers-by, and ancient windows darkened, and that in consequence the house was diminished in value, and the trade injured. In respect of all these matters the plaintiff claimed compensation, and brought an action in which this special case was stated; the questions for the Court being:—whether the plaintiff was entitled to compensation for all or any of the above matters; and, if so, whether by action or under the Lands Clauses Consolidation Act, 1845, or any other act.

11 & 12 Vict. c. clxiii. s. 2, incorporates the Lands Clauses Consolidation Act, 1845, and makes its provisions applicable to the purposes of the act, "except so far as the same provisions or any of them are inconsistent with this act, or are hereinafter declared not to extend thereto;" and s. 3 enacts that "the provisions in the said Lands Clauses Consolidation Act contained relating to *the purchase and taking of lands otherwise than by agreement*, and also the provisions therein contained, directing lands not wanted to be sold, and that lands not sold shall vest in the owners of adjoining lands, and that lands intended to be sold shall be offered to adjoining owners, and requiring owners to claim their

1868

FERRAR v. COMMISSIONERS OF SEWERS OF LONDON.

right of pre-emption within six weeks, and also with respect to the recovery of forfeitures, penalties, and costs, shall not extend to this act or to the purposes thereof."

Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), s. 5:— "And whereas it may be convenient in some cases to incorporate with acts of parliament hereafter to be passed, some portion only of the provisions of this act, be it therefore enacted that, for the purpose of making any such incorporation, it shall be sufficient in any such act to enact that the clauses of this act with respect to the matter so proposed to be incorporated (describing such matter as it is described in this act in the words introductory to the enactment with respect to such matter), shall be incorporated with such act, and thereupon all the clauses and provisions of this act with respect to the matter so incorporated shall, save so far as they shall be expressly varied or excepted by such act, form part of such act, and such act shall be construed as if the substance of such clauses and provisions were set forth therein with reference to the matter to which such act shall relate."

The sections of the act, from s. 16 to s. 68 inclusive, are introduced by the words, "and with respect to the purchase and taking of lands otherwise than by agreement;" and by s. 68, "if any party shall be entitled to any compensation in respect of any lands or of any interest therein, which shall have been taken for or *injuriously affected by* the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special act, or any act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of 50*l.*, such party may have the same settled either by arbitration or by the verdict of jury, as he shall think fit;" &c.

Keane, Q.C., for the plaintiff. Compensation is not given in direct terms for the injurious affecting of lands, but it is clearly implied by s. 68 of the Lands Clauses Consolidation Act, and the only question is, whether that provision is incorporated with the special act. It clearly is so, for s. 2 of the special act incorporates the whole act, and s. 3 only excludes provisions relating to certain enumerated things, of which the injurious affecting of lands is not one. This provision, therefore, could only be excluded by holding

1868

FERRAR v. COMMISSIONERS OF SEWERS OF LONDON.

that all the sections from 16 to 68 are excluded, by reason of their being introduced by the words, "and with respect to the purchase and taking of lands otherwise than by agreement." This must be contended for on the strength of s. 5 of the Lands Clauses Act; but it is much more reasonable to interpret the intention of the legislature in an act from the act itself, than from the act of a previous session. Now s. 3 of the special act, which excludes the provisions of the Lands Clauses Act relating to the purchase or taking of land, also excludes in four several sentences, the provisions of the Lands Clauses Act relating to superfluous lands; but in the Lands Clauses Act these provisions are contained in sections 127—135, which are introduced by entirely different words, viz.:—"And with respect to lands acquired by the promoters of the undertaking under the provisions of this or the special act, or any act incorporated therewith, but which shall not be required for the purposes thereof." It is clear, therefore, that in s. 3 the legislature is not following strictly the arbitrary arrangement which they laid down in s. 5 of the Lands Clauses Act, and the section must be construed in its natural sense as excluding only such of the provisions of the Lands Clauses Act as really relate to the purchase and taking of lands. The injustice worked by the contrary construction would be great.

The Court called upon

Brown, Q.C. (*Griffits* with him), for the defendants. The rule established by s. 5 of the Lands Clauses Act must be attended to, for it cannot be supposed that when the legislature used the very introductory words of ss. 16—68, they did not mean them to have the application which the Lands Clauses Act gives them. The plaintiff is, therefore, excluded from compensation; nor is the result unjust, for the improvement in the street is a benefit to him. The argument is strongly confirmed by the fact that the special act provides compensation in several cases where if s. 68 were incorporated it would apply, and make these provisions unnecessary, as in ss. 53, 153, 156, 159. (1) It appears also by ss. 236,

Post 229

(1) Section 53 empowers the commissioners to make sewers, &c., under the streets, and if needful, through cellars and vaults, making compensation for any damage wilfully or negligently done; s. 153 empowers them, when projecting buildings, &c., are taken down to be rebuilt, to require the buildings to be set back, making full compensation; s. 156 empowers them

239 (1), that the act intended to provide within its own limits for the assessment of all compensation to be paid on account of works done by the commissioners under the act. This is to be made by justices, and to introduce under s. 68 of the Lands Clauses Act the remedies of arbitration and jury trial for so large a class of claims as the present, would be an anomaly.

[The Court refused to hear any argument on, or to decide the question of, what heads of damage were the subject of compensation, on which point *Keane, Q.C.*, referred to *Beckett* v. *Midland Railway Company*. (2)]

KELLY, C.B. [after stating the facts of the case, proceeded]: It appears that the local act (11 & 12 Vict. c. clxiii.) by s. 2, expressly incorporates the Lands Clauses Consolidation Act, 1845; and that act contains a provision (s. 68) for assessing the compensation to be paid to persons whose premises are injuriously affected by the privileged works. They may at their pleasure resort to arbitration, or to the decision of a jury. It is admitted that the plaintiff's premises have been injuriously affected by the defendants' works; and therefore if the local act contained nothing more upon the subject than I have stated, it is clear that he would be entitled to compensation. He would not, however, be entitled to bring any action, for we are all clearly of opinion that, the works being authorized by the defendants' local act, no action will lie.

---

to remove projections and obstructions, making reasonable compensation, to be ascertained by any justice as in the act directed; and s. 159 entitles them under certain circumstances to take ruinous or dangerous houses, making compensation as provided by the Lands Clauses Act in the case of lands taken otherwise than with the consent of the owners and occupiers.

(1) By s. 236, in all cases where the amount of any damages, costs, or expenses is by this act directed to be ascertained or recovered in a summary manner, or any damages, costs, or expenses are by this act directed to be paid, and the method of ascertaining or enforcing the payment thereof is not provided for, such amount, in case of dispute, shall be ascertained and determined by any justices: and by s. 239, where in this act any question of compensation, expenses, charges, or damages is referred to the determination of any one justice or more, the justice or justices are given powers for conducting the inquiry, and are to determine the amount. By s. 166, arbitration under the Lands Clauses Act is prescribed for the assessment of compensation for loss or diminution in the value of offices, and this is the only case of arbitration in the act.

(2) Law Rep. 3 C. P. 82.

1868

FERRAR v. COMMISSIONERS OF SEWERS OF LONDON.

But it is contended that the proviso contained in s. 3 of the local act takes this remedy away, by excluding the operation of that part of the Lands Clauses Act which relates to this subject. Now, looking at the literal meaning of the words and their ordinary construction, they simply amount to this; whereas by s. 2, the whole of the Lands Clauses Act is incorporated, an exception is hereby introduced of so much of that act as relates to the purchase and taking of lands otherwise than by agreement. The present case not being a case of that nature, but of the injurious affecting of lands, it is clearly not within the exception, and is therefore left to the operation of the act. But it is then contended that by virtue of s. 5 of the Lands Clauses Act, the whole of the 68th section is included within the exception, as forming one section of a part of the act which s. 5 treats as a whole under a single descriptive heading, and which is therefore excluded as a whole by the exception, using the same or similar words of description, contained in s. 3 of the local act.

Now, in the first place, s. 5 of the Lands Clauses Act relates not to exceptions excluding portions of the act, where the whole act has been already incorporated, but to acts affirmatively incorporating, not the whole act, but only certain portions of it, the reference to which is thus facilitated. In the latter case, an incorporation of part of the act by reference to the heading would have made all that is contained in the several sections introduced by that heading a part of the incorporating act; but s. 5 has no reference to the former case, where the whole act has already been incorporated with all its parts and provisions. If, therefore, a question arises with respect to the purchase or taking of lands otherwise than by agreement, that claim is withdrawn from the operation of the Lands Clauses Act; but the question of land injuriously affected is not excluded, notwithstanding the provision relating to it may occur in the same section.

We have been referred, however, to a number of sections of the local act in which provisions occur entitling the owner to compensation for injuries of various kinds. But on looking at these sections, they appear for the most part to refer to temporary damages which might or might not injuriously affect the land, such as a temporary disturbance of the soil, or the taking up of a cellar or

vault, which might, for instance in the case of a wine vault, cause much inconvenience and loss to the owner, but yet could not be said to injuriously affect the land. The fact that such temporary injuries are specifically provided for can furnish no argument for assuming an intention to exclude from the benefit of the provisions contained in the Lands Clauses Act such an injurious affecting of land as the present, for which it is admitted no compensation is given by the local act. The plaintiff is therefore clearly entitled to compensation.

PIGOTT, B. I am of the same opinion. No action can be maintained, because the defendants' works have been executed under their statutory powers. But where such powers are given, we should certainly expect to find a provision for compensation in cases where the effect of the works has been to produce injury to private property. It has been argued that the plaintiff obtains an equivalent for the injury in the improvement of the street, and this is offered as an explanation of the alleged fact that the legislature has provided no compensation for him; but we can clearly give no weight to any such argument, which is contravened by the fact that in other cases compensation is provided, and also that the plaintiff pays his quota of the rates by which the improvements are effected.

The question then arises on s. 2 of the local act, which incorporates the Lands Clauses Act, and s. 3, which excludes the operation of certain portions of it. To discover what part it is that is thus excluded we must look carefully at the language of s. 3, which in plain terms excepts only that part which relates to lands taken otherwise than by agreement, and certain other specified parts, but not that part which relates to lands injuriously affected. We are called upon to include these last provisions in the exception by virtue of s. 5 of the Lands Clauses Act: but as the Chief Baron has already pointed out, that section does not apply to the present state of things, but to a case where a local act incorporates by reference certain portions only of the general act. We are further, in support of this contention, referred to other sections in the local act; but on looking carefully at these sections we find that they all, almost without exception, refer to matters requiring

1868

FERRAR v. COMMISSIONERS OF SEWERS OF LONDON.

special notice on account of the nature of the operations which are sanctioned, and of the injury that may be caused by them. Thus s. 53 refers to wilful damage, s. 153 to projecting buildings, and s. 159 to ruinous buildings. The defendants then being clearly authorized by s. 120 to do work which may injuriously affect land, and careful provision being made in the act for the compensation for other injuries, whilst none is made for this except by the incorporation of the general act, I cannot imagine that it was the intention of the legislature to take away by the exception, which in words relates to a different subject, the remedy for an injurious affecting of lands which is conferred by the incorporated act.

CLEASBY, B. I am of the same opinion. No action lies, for the works were done under the authority of the special act; and whatever remedy the plaintiff has must be in the shape of statutory compensation. Is he then entitled to such compensation? I think he is, because the Lands Clauses Act which provides compensation in the like case is expressly incorporated, and its provisions relating to this subject are not excluded. There may be some ambiguity in the words of s. 3, and some argument arises in the defendants' favour from the provision contained in s. 5 of the Lands Clauses Act. But when we look to s. 3, we find that it clearly has in view the taking of lands only; for, after excepting the provisions of the Lands Clauses Act which relate to the purchase and taking of lands otherwise than by agreement, it goes on to exclude also the provisions "directing lands not wanted to be sold, and that lands not sold shall vest in the owners of adjoining lands, and that lands intended to be sold shall be offered to adjoining owners, and requiring owners to claim their right of pre-emption within six weeks," shewing by the connection that the taking of lands only, and not the injurious affecting of lands was then in view. If, however, it had appeared that a provision existed in the local act applicable to all the cases in which compensation was payable, there would be a strong argument against giving another remedy. But on looking at the sections referred to, this is not so. For, the first branch of s. 236 refers only to cases where damages, costs, or expenses are directed to be recovered in a summary manner, and cannot apply at all to the present case; the second

branch refers to cases where damages, costs, or expenses "are by this act directed to be paid, and the method of ascertaining the amount or enforcing the payment thereof is not provided for." Now, assuming compensation to be included in these words, which do not strictly describe it, yet in the present case, on the plaintiff's argument, a method is provided, namely the method laid down by the Lands Clauses Act; this section therefore leaves the question quite open, and could only be appealed to by the defendants if it had been first proved that in respect of this claim the Lands Clauses Act was excluded from operation. In conclusion I will refer to the case of *Reg.* v. *Mayor of London* (1), which was not cited in the argument, only for the purpose of saying that I think it is not inconsistent with our present decision.

Judgment for the defendants in the action; and the defendants to pay to the plaintiff compensation, to be determined by an arbitrator agreed upon.

Attorneys for plaintiff: *Brown & Godwin.*
Attorney for defendant: *A. J. Baylis.*

WRIGHT *v.* JELLEY.

Nov. 23.

Debtor and Creditor—Deed under Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *Schedule D—Equitable Plea.*

5 QB. 684

A deed made in the form of Schedule D to the Bankruptcy Act, 1861, and registered under s. 192, cannot be pleaded as an equitable plea to an action of debt by a non-assenting creditor.

DECLARATION: Money counts.

Second plea (2): a deed executed by the defendant in the form of schedule D., and duly assented to and registered under s. 192 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), not stating it to have been assented to by the plaintiff.

Demurrer.

(1) Law Rep. 2 Q. B. 292.

(2) The first plea, in addition to setting out the deed, contained averments shewing an accord and satisfaction by accepting a dividend and promissory notes, under a general agreement with the creditors. This plea was not demurred to.

1868

WRIGHT v. JELLEY.

Holl, in support of the demurrer. This deed contains no release, nor anything equivalent to a release; it cannot, therefore, be pleaded to the action. It is clearly settled that such a deed does not give a good legal plea: *Ipstones Park Iron Ore Company, Limited*, v. *Pattinson* (1); *Eyre* v. *Archer* (2); *Clarke* v. *Williams* (3); not even as against an assenting creditor: *Jones* v. *Morris*. (4) There is no more reason to say that it gives a good equitable defence, nor can any instance be produced of an action restrained by perpetual injunction on this ground. If the intention of the act had been otherwise, a form of plea would, doubtless, have been given, as in the case of bankruptcy (12 & 13 Vict. c. 106, s. 205; 24 & 25 Vict. c. 134, s. 161), or at least the act would have said clearly that such a deed was a bar to any cause of action covered by it. The defendant's true remedy is that afforded by s. 198, which puts the judgment when recovered at the mercy of the court of bankruptcy; that section would otherwise have been unnecessary.

Beasley, in support of the plea. If judgment were recovered in the action, it is clear that execution would not be allowed to issue: *Ex parte Thatcher*. (5) It binds therefore in equity, or at least, since the judgment must be futile and fruitless, the Court will avoid circuity and vexatious litigation by restraining the action at once. But s. 197 of the act (6) is express to shew that after the registration of such a deed, the creditors are in the same position

10 Jur N S 428

(1) 2 H. & C. 828; 33 L. J. (Ex.) 193.

(2) 16 C. B. (N.S.) 638; 33 L. J. (C.P.) 296. 10 Jur N S 802

(3) 3 H. & C. 1001; 34 L. J. (Ex.) 189.

(4) 6 B & S. 198; 34 L. J. (Q.B.) 90.

(5) Law Rep. 2 Ch. App. 93.

(6) Section 197:—"From and after the registration of every such deed or instrument in manner aforesaid, the debtor and creditors, and trustees, parties to such deed, or who shall have assented thereto or are bound thereby, shall, in all matters relating to the estate and effects of such debtor, be subject to the jurisdiction of the court of bankruptcy, and shall respectively have the benefit of and be liable to all the provisions of this Act, in the same or like manner as if the debtor had been adjudged a bankrupt, and the creditors had proved and the trustees had been appointed creditors' assignees under such bankruptcy; . . . and, except where the deed shall expressly provide otherwise, the Court shall determine all questions arising under the deed according to the law and practice in bankruptcy, so far as they may be applicable, and shall have power to make and enforce all such orders as it would be authorized to do if the debtor in such deed had been adjudged bankrupt, and his estate were administered in bankruptcy."

as they would be after an adjudication in bankruptcy. They are to "have the benefit of and be liable to all the provisions of this act, *as if they had proved.*" Now it is clear that creditors who have proved, cannot afterwards bring an action against the bankrupt: *Elder* v. *Beaumont.* (1) The plea, therefore, of the execution and registration of the deed is of the same force as a plea that the plaintiff has come in and proved under a bankruptcy, and on the authority of the case cited a good equitable answer to the action. He also cited *European Central Railway Company* v. *Westall* (2), and *Rossi* v. *Bailey.* (3)

Holl was not called on to reply.

KELLY, C.B. The question is, whether the mere registration of a deed, framed according to the form given in Schedule D., operates as a defence, either legal or equitable, to an action by a non-assenting creditor. As far as regards its operation as a defence at law, we are concluded by a series of decisions, which have settled that it is no legal answer. On looking at the act, it is equally clear that it cannot be pleaded as an equitable defence. It is manifest that s. 198 only applies to restraining execution, and that provision is itself inconsistent with the idea that the registration of such a deed as this was intended to put a stop to the actions of non-assenting creditors. We are referred to the decision of *Ex parte Thatcher* (4), where, under s. 198, the Court refused to permit a creditor to proceed to execution. But the fact that in that case the Court thought fit in the exercise of its discretion not to allow execution to issue, is no authority whatever for saying that it would have restrained the progress of the action up to judgment. The 197th section, however, is further relied on to shew that the creditor can no longer pursue his legal remedy. Now that section in effect amounts to this, that jurisdiction is given to the court of bankruptcy over the debtor, trustees, and creditors in all matters relating to the estate and effects of the debtor, as if there had been a bankruptcy, and that in the court of bankruptcy the parties shall respectively have the benefit of and be liable to the provisions of the act as if an

(1) 8 E. & B. 353; 27 L. J. (Q.B.) 25.
(2) Law Rep. 1 Q. B. 167.
(3) Law Rep. 3 Q. B. 621.
(4) Law Rep. 2 Ch. App. 93.

1868

WRIGHT v. JELLEY.

actual adjudication of bankruptcy had taken place. But that in no way prevents the creditor from prosecuting his action to judgment, so as to prove his debt and entitle himself to a dividend. When he has done so, he is prohibited by s. 198 from putting his judgment in force without the leave of the Court, and then the court of bankruptcy may be justified by circumstances in withholding its permission; but there is nothing to prevent him from at least placing himself in a position to make the application. He has a common law right to judgment, and only the express words of a statute will suffice to exclude him from that right. But if we put on the statute the construction for which the defendant contends, we should be in fact giving to the mere registration of a deed all the effect of a discharge in bankruptcy.

I inquired whether any case could be cited where the Court of Chancery (for the court of bankruptcy may not have that power), had granted a perpetual injunction to restrain a creditor from prosecuting his action under circumstances similar to those of the present case. No instance has been produced, although the statute has been now for several years in operation, and many cases must have arisen which would give occasion to such a decision. Our judgment must be for the plaintiff.

CHANNELL, B. I am of the same opinion. As to the effect of deeds in this form, I adhere to the observations which I made in the case of *Ipstones Park Iron Ore Company, Limited*, v. *Pattinson* (1); they were not strictly necessary to the decision, as the question there was only whether the deed furnished a good *legal* defence, which the Court held it did not; but the Court sanctioned the view which I then suggested, that the debtor's remedy is not by barring the action, but by staying the execution, or by applying to the court of bankruptcy to deprive the creditor of the benefit of the deed where he has elected another remedy.

PIGOTT, B., concurred.

CLEASBY, B. I am of the same opinion; and I will only add a few words with respect to the case of *Elder* v. *Beaumont*. (2) There

(1) 2 H. & C. at p. 836; 33 L. J. (Ex.) at p. 196.
(2) 8 E. & B. 353; 27 L. J. (Q.B.) 25.

1868

WRIGHT v. JELLEY.

the defendants pleaded their certificate of conformity under an adjudication in bankruptcy. The plaintiff replied by new assignment that the debt sued for (which arose on a covenant by the defendants to maintain a policy by which a debt from them to the plaintiff was secured) arose after the bankruptcy; to which the defendants pleaded on equitable grounds that the plaintiff had before suit already proved a part of the secured debt under the bankruptcy, and elected to take the benefit of the petition in respect of the whole. The Court held the plea good, because they construed it as alleging sufficiently an election by the plaintiff to take the benefit of the petition for the whole debt; and if that were the case here, the plaintiff clearly could not be allowed to come in and obtain what he could under the deed, and afterwards sue for the debt as still subsisting.

Judgment for the plaintiff.

Attorneys for plaintiff: *Lumley & Lumley.*
Attorneys for defendant: *Wright, Bonner, & Wright.*

MASSEY *v.* SLADEN AND OTHERS.

Nov. 23.

Bill of Sale—Demand—Reasonable Time—Damages.

To secure a floating balance, the plaintiff conveyed to the defendants by bill of sale the machinery, &c., in and upon the plaintiff's mill; the bill of sale contained a proviso for redemption if the plaintiff should *instantly on demand, and without delay on any pretence whatsoever*, pay the sum due; it provided that the demand might be made personally on the plaintiff, *or by giving or leaving verbal or written notice to or for him* at his place of business, &c., so nevertheless that a demand be in fact made; that on default of payment the defendants might enter, and seize, and sell, but that until default the plaintiff should remain in possession.

In the plaintiff's absence from his place of business, a demand was made there by the defendants upon his son, who stated his inability to meet it; and the defendants immediately seized:—

Held, that the notice required by the deed in case of the plaintiff's absence was such a notice as might be reasonably supposed to reach the plaintiff, and to give him an opportunity of complying with it within a reasonable time; and that the seizure was, therefore, not justified.

THE plaintiff, a manufacturer at Accrington, being indebted to the defendants, his commission agents at Manchester, for advances

1868

MASSEY v. SLADEN.

and requiring further assistance, executed to the defendants on the 22nd of March, 1867 (amongst other securities), a bill of sale of all the machinery, &c., then standing and being upon and about his mill and premises, and all machinery, &c., which should, during the continuance of the security, be erected on, added to, brought upon, or used in the mill and premises.

The bill of sale contained a proviso for redemption if Massey (the plaintiff), his heirs, &c., should *instantly on demand, and without any delay on any pretence whatsoever*, pay to the defendants, their executors, &c., the balance for the time being due for goods sold, advances, payments, or otherwise howsoever, together with interest for the same at 5 per cent. per annum from the time of advance, payment, or sale; "and it is hereby declared and agreed that such demand as aforesaid may be made verbally or in writing, and shall be sufficient if made either personally upon the said R. Massey, or by giving or leaving verbal or written notice to or for him at his present or last known place of business, or any other place or premises in or upon which any property the subject of this security may be, or at the residence or last known residence of him, *so nevertheless that a demand be in fact made.*"

The deed also contained a power of attorney to the defendants at any time thereafter to make, execute, or perfect any assignment, transfer, or delivery to them of the machinery, &c., thereinbefore referred to (if any) not passing at law by the effect of the assignment therein contained, and also an assignment to themselves of the leasehold or other interest of Massey in any premises in which the machinery, &c., might be.

It was also provided that in case Massey, his executors, &c., should make default in payment of the moneys secured, it should be lawful for the defendants, their executors, &c., to enter any premises in or upon which any property intended to be thereby assigned, or to be subject to the provisions thereof, should be, or be supposed to be, and to take into their possession, remove, and sell all such property, and also the leasehold interest of Massey in the premises; and it was agreed that "until such default should be made in payment as thereinbefore mentioned," the effects and premises intended to be thereby assigned should be peaceably and quietly enjoyed, held, and possessed by Massey, his executors, &c.;

and that the deed should be a security for the floating balance for the time being due and owing, not exceeding in the whole 9000*l.*

On the 2nd of April, 1868, the plaintiff being then indebted to the defendants to an amount exceeding 9000*l.* for moneys advanced at various times, the defendants, in pursuance of the power of attorney contained in the deed, executed an assignment from Massey to themselves of all the machinery, &c., then in the mill which had not passed by law by the previous deed, and of the tenant-right, leasehold, or other interest of Massey in the mill and premises.

On the 3rd of April, at the request of the defendants, the plaintiff went to Manchester and saw the defendants, who then made a demand for payment of the sum due; but on the same day, previously to this demand being made, the defendants' solicitor had already, by their directions, made a demand at Accrington on the plaintiff's son, who was left in charge of the mill, for payment of the amount due for advances and interest, and, on his stating his inability to pay, had immédiately taken possession. In consequence of this the plaintiff was compelled to stop payment; and he now sued the defendants. (1)

On these facts appearing at the trial before Hannen, J., at the Liverpool summer assizes, a verdict was taken by consent for 100*l.*, with leave to the defendants to move to enter a verdict for them, on the ground that, by the deeds of the 22nd of March, 1867, and the 3rd of April, 1868, they were justified in entering the mill and taking possession of the machinery and goods; or to reduce the amount of the verdict to nominal damages. A rule having been obtained accordingly,

Dowdeswell, Q.C., and *Herschell*, shewed cause, and contended that the terms of the deed clearly shewed the intention of the

(1) The form of the action was trespass qu. cl. fr. with aggravation; and the defendants pleaded: 1. Not guilty: 2. Denial of property. On the argument of the rule, the counsel for the defendants objected that (at any rate after the deed of the 3rd of April) the plaintiff could not succeed in this form of action, but must, if at all, sue on the covenant for quiet enjoyment. But the Court considered that by the arrangement made at Nisi Prius the substantial question was submitted to their decision.

1868

MASSEY v. SLADEN.

parties that a demand should be made, which the plaintiff could have the opportunity of acting upon; that, even assuming the demand made to the plaintiff personally at Manchester to have been good, yet being after the seizure, it could not justify it; and that the demand made by the defendants' instruction at the plaintiff's mill at a time when they knew him to be absent, and absent at their request, was a merely simulated compliance with the terms of the deed, and could not be said to be a demand given or left to or for him. They contended further, that this was a case in which the jury might give substantial damages.

The Court called upon

Holker, Q.C., and *Crompton*, in support of the rule. The plaintiff's construction would entirely defeat the object of the deed, which was that the creditor might immediately enforce his security, whether the debtor were present or absent. If he is absent, it must be presumed that he leaves some one in charge to answer for him, and the demand is sufficient if made on that person. The only thing that could make the seizure unlawful would be that the demand was made for a wrong amount, but this is not contended.

[CLEASBY, B. The demand was for payment of advances and interest; by the deed the interest is to run from the date of the advance, and the advances were made at various times. How can such a demand be complied with unless some time is given for calculation?]

He was bound to know what was due, and this was admitted to exceed 9000*l.*, the sum secured. In *Toms* v. *Wilson* (1), under somewhat similar circumstances, it was held that a valid demand was made, but that there was no default, because a reasonable time was not allowed for payment. But here an answer was made to the demand, which admitted that it could not be met, therefore any further time was unnecessary. The terms of the present deed, also, are stronger than those in *Toms* v. *Wilson* (1), for they provide that payment shall be made "instantly on demand and without delay on any pretence whatsoever." Supposing, however, that no valid demand, or no default was made, the plaintiff can only recover nominal damages; for the consequences to him would have been the same if the seizure had taken place after the de-

(1) 4 B. & S. 455; 32 L. J. (Q.B.) 382.

mand made on him personally: *Toms* v. *Wilson* (1); *Brierly* v. *Kendall.* (2)

KELLY, C.B. The question is whether, by this deed, the defendants were, under the circumstances, entitled to enter and seize the plaintiff's goods? That depends on the language of the instrument, which is framed so as to give the defendants every advantage which they could possibly have, in taking with expedition those steps which they were bound to take. But these words, though stringent, nevertheless make it necessary that there should be a personal demand and a default; or, if a personal demand could not be made by reason of the plaintiff's absence from his place of business, then that notice should be left or given in such a way that, if reasonable diligence were used, it might without substantial delay come to his knowledge. It is true that the deed provides that instantly on the demand being made the plaintiff must pay. But this must refer to a personal demand to be made in case he is found upon the premises, and cannot apply to the alternative demand to be made in his absence; and for this reason, if he is on the premises he must make some answer to the demand, either offering to pay at once, or, if he were unable to do so, admitting his inability; in which latter case the defendants would have been entitled to seize at once. But if he is not there, verbal or written notice is to be given or left to or for him at his present or last known place of business, "so nevertheless that a demand be in fact made." Why? Obviously, in order that he may be put in the same position as he would have been if he had been present, and a personal demand had been made upon him. That it was intended some reasonable time should be allowed for the plaintiff to receive information of the demand is certain from the use of the word *notice*, which clearly points to something adapted to the purpose of giving knowledge. Therefore it is clear that a notice must be left on the premises under such circumstances that it must be presumed the plaintiff would give an answer to it within a reasonable time. And were it otherwise, the absurd and inequitable consequence might follow, that the plaintiff might have at his bankers moneys far exceeding the amount demanded, and yet might on his

(1) 4 E. & S. 455; 32 L. J. (Q.B.) 382. (2) 17 Q. B. 937; 21 L. J. (Q.B.) 161.

1868

MASSEY v. SLADEN.

8 Jur (N.S.) 294

return from a five minutes' absence from his place of business find that his opportunity of complying with the demand was lost, and that his goods were already in the hands of the defendants. There can be no doubt the parties contemplated that such an opportunity should be afforded him; and even the word "instantly" allows of a perfect compliance with the deed by his offering to the defendants his cheque for the amount, and if it were refused, taking the time necessary to enable him to obtain the money by cashing it.

But if on these words the matter were doubtful, all doubt would be removed by the proviso, that in case the plaintiff should make default the defendants might enter and sell, but that until default the property should remain in the possession and enjoyment of the plaintiff. From this it is clear, that what was contemplated was a demand with a reasonable time for complying with it; for it is only if he had an opportunity of knowing the demand that he could have an opportunity of either complying with it, or declaring himself unable to do so; and in the latter case only could there be said to be a default.

Now here, personal service on the plaintiff not being effected, it was necessary, in order to make the clause applicable, that a notice should be given or left to or for him in such a manner that it might be fairly supposed he would, if proper diligence were used, in a reasonably short time receive it. But, on the contrary, a demand is made in his absence on some other person for him, and immediately afterwards a seizure takes place. This is no compliance with the terms of the deed, and we must therefore hold that the seizure was unlawful.

[After reviewing the evidence, his Lordship came to the conclusion that, although the plaintiff would in fact have sustained as much pecuniary loss if the seizure had been made after the personal demand to the plaintiff, yet, under the circumstances of the case a jury would be entitled to give substantial damages; and that 100*l.* having been agreed on by the parties as the amount for which the verdict should be taken, the Court would not interfere with it. And in this the learned Barons concurred.]

CHANNELL, B. I also am of opinion that the plaintiff is entitled to retain his verdict. It may be, that if a personal service had

been made on the plaintiff, the defendants might have seized immediately afterwards, making the seizure in effect concurrent with the default. But it is unnecessary to decide this, for there was here clearly no personal service before the seizure. The defendants had, however, the power of seizing after leaving a notice at the plaintiff's place of business, and they clearly intended to exercise this power, because they served this notice at the plaintiff's mill at Accrington in his absence. But in point of law it was a condition of the exercise of this power that notice should be given or left to or for the absent debtor in such a manner that it could reach him; and that he could, if otherwise able, comply with it. They must have known well that the plaintiff was away from his place of business; but without leaving any interval in which he might have been apprised of the demand, they seize the property at once. There was therefore no sufficient demand, and no default on the part of the plaintiff to justify the seizure by the defendants.

PIGOTT, B. I am of the same opinion. It is not necessary to define what time ought to elapse between the notice and the seizure. It must be a question of the circumstances and relations of the parties, and it would be difficult, perhaps impossible, to lay down any rule of law on the subject, except that the interval must be a reasonable one. But it is quite clear that the plaintiff did not intend to stipulate for a merely illusory notice, but for some notice on which he might reasonably expect to be able to act. On the contention of the defendants, however, we might as well strike out the stipulation, for it would rather be calculated to deceive the plaintiff, than to afford him any protection.

CLEASBY, B. I am of the same opinion. The difficulty as to the validity of the notice which I felt and expressed during the argument has not been removed. The defendants are seeking to enforce the strict construction of a very stringent clause, by which the sum due is to be paid instantly on demand, without any delay, and on default the goods are to be seized. But if you are to enforce such a right, you must make a demand which is specific, you must let the debtor know what is the sum you insist on the payment of. The defendants' demand was not specific, but of

1868

MASSEY v. SLADEN.

9000*l.* advanced at different times, and interest upon the sums so advanced. Such a demand cannot justify a seizure immediately following it.

Rule discharged.

Attorneys for plaintiff: *Reed, Phelps, & Sidgwick, for Grundy & Coulson, Manchester.*

Attorneys for defendants: *Pritchard & Englefield, for Boote & Ryland, Manchester.*

Nov. 24.

STEVENS *v.* COPP.

*Landlord and Tenant—Assignee of Reversion—Condition running with Land—Offence against Game Laws—*32 *Hen.* 8, *c.* 34.

A lease contained a proviso for re-entry in case the lessee, his executors, administrators, or assigns, or any tenant, undertenant, or occupier of the premises demised, should, at any time during the term thereby granted, be lawfully convicted of any offence against any of the present or future game laws. The occupier of the premises having been convicted of killing game without a game certificate, the assignee of the reversion brought ejectment:—

Held, that he could not maintain the action.

Per Martin, Channell, and Cleasby, BB., that the assignee of the reversion could not avail himself of the breach of the condition, inasmuch as the condition did not touch or concern the land demised, and therefore did not run with the land.

Per Kelly, C.B., that the offence of which the occupier had been convicted was not an offence against the "game laws" within the meaning of the condition.

EJECTMENT for a messuage, tenement, and premises called Middle Gribbles, in the parish of Little Torrington, in the county of Devon. The defendant appeared to defend for the whole.

By an indenture, dated the 23rd of December, 1825, the property in question had been let by George Ackland Barbour to Jonas Copp for a term of ninety-nine years from the 25th of March then last past. In the lease there was a reservation to the landlord of "all game and wild fowl, with liberty to hunt, shoot, and sport, on the premises demised, at all times during the said term," and it was thereby, amongst other things, declared and agreed as follows: "If the said Jonas Copp, his executors, administrators, or assigns, or any tenant, undertenant, or occupier of the said demised premises, or of any part thereof, shall, at any time during

the said term hereby granted, be lawfully convicted of committing any trespass on the lands of the said George Acland Barbour, his heirs and assigns, or of any offence against any of the present or future game laws, it shall be lawful for the said George Acland Barbour, his heirs and assigns, into and upon the said demised premises, or any part thereof, in the name of the whole, to re-enter, and the same to have again, repossess, and enjoy as of their first and former estate, and from thenceforth this present indenture of lease shall cease and determine, and be void to all intents and purposes whatsoever."

Mr. Barbour, the original lessor, died in the year 1839, having devised the reversion to William Arundel Yeo and his heirs. Mr. Yeo died in 1862, having by his will devised it to trustees for sale, from whom the plaintiff bought it in October, 1864. The defendant, Thomas Copp, was the occupier of the premises under an assignee of Jonas Copp, the original lessee, and whilst in occupation, was on the 23rd of November, 1867, convicted before two justices for the county of Devon "for that he, the said Thomas Copp, on the 11th of November now instant, at the parish of Little Torrington, in the said county, did use a certain gun for the purpose of taking or killing game, he, the said Thomas Copp, not being authorized so to do for want of a game certificate, contrary to the form of the statute, &c.," and fined 5*l.*, with costs. It did not appear whether the offence had been committed on the land demised or not. The plaintiff, the assignee of the reversion, now sought to re-enter for the breach committed by the defendant, the occupier, of the above condition contained in the original lease.

The cause was tried at the Devon summer assizes, 1868, before Channell, B., when, on proof of the above facts, a verdict was entered for the plaintiff, and leave was reserved to the defendant to move to enter a nonsuit. A rule was accordingly obtained on the ground that the breach of covenant proved at the trial was not such a breach as would entitle the plaintiff to re-enter.

Montague Bere shewed cause. The condition for re-entry, in case of the occupier being convicted of an offence against the game laws, runs with the land, and is therefore within the statute 32 Hen. 8, c. 34, enabling the assignee of the reversion to sue.

1868

STEVENS v. COPP.

[KELLY, C.B. Before you enter into that question, it must first be shewn that shooting without a certificate is an offence against the "game" laws. Is it not rather an offence against the revenue laws?]

The conviction is in the form prescribed by 31 Geo. 3, c. 21, and the offence is one against the game as well as the revenue laws. There have been various changes in the amount of duty since, and the words "licence to kill" have been substituted for "game certificate" (see 1 & 2 Wm. 4, c. 32; 23 & 24 Vict. c. 90), but nothing has occurred to affect the quality of the offence. Assuming, therefore, that it is within the words of the condition, the assignee of the reversion may maintain ejectment. The true test of whether a condition or covenant is one on which an assignee may sue is to be found in *Vyvyan* v. *Arthur* (1), where Best, J., says (2): "The general principle is, that if the performance of the covenant be beneficial to the reversioner, and to no other person, his assignee may sue on it; but if it be beneficial to the lessor, without regard to his continuing owner of the estate, it is a mere collateral covenant upon which the assignee cannot sue." In the present case no one, except the owner of the estate (to whom the lease reserves the game), could be possibly benefited by the condition; but to him it might be very material that the premises should be occupied by persons who would respect the game laws. It is not absolutely essential that the condition should be with regard to something to be done or left undone on the land demised. It is enough if it touches the mode of enjoyment of the estate. Thus a covenant not to assign without licence runs with the land: *Williams* v. *Earle*. (3)

[KELLY, C.B. Is there any decision as to whether a proviso for re-entry in case the occupier becomes bankrupt can enure to the benefit of the assignee of the reversion?]

In *Doe* d. *Griffith* v. *Pritchard* (4) it seems to have been considered that a forfeiture by insolvency was not within the statute 32 Hen. 8, c. 34, but in *Hammond* v. *Colls* (5) the contrary was assumed. On principle a condition against bankruptcy ought to

(1) 1 B. & C. 410.
(2) 1 B. & C. at p. 417.
(3) Law Rep. 3 Q. B. 739.
(4) 5 B. & Ad. 765.
(5) 1 C. B. 916.

be held to run with the land. [He also cited *Roe* d. *Bamford* v. *Hayley* (1); *Vernon* v. *Smith* (2); *Jourdain* v. *Wilson* (3); *Hartley* v. *Pehall* (4); *Hooper* v. *Clark.* (5).]

Arthur Charles, in support of the rule. First: The offence committed by the defendant is against the revenue laws only. The various acts imposing duties on game certificates or licences, and inflicting penalties on those who kill game without them, are revenue acts; and the words "offences against the game laws" in the condition in the lease ought to be confined to offences such as trespassing in pursuit of game, night poaching, &c., which might be made the subject of indictment. Secondly: Granting that the condition has been broken, the assignee of the reversion cannot re-enter, for the statute 32 Hen. 8, c. 34, enabling him in some cases to have the benefit of conditions broken, only applies to such as "touch and concern the thing demised:" *Spencer's Case.* (6) But the condition here does not in any sense touch the land. In order to do so, a condition must directly affect the value of the land, and also must either refer to something to be done or not done on the land itself, or to an actual dealing with it: *Mayor of Congleton* v. *Pattison.* (7) In that case Bayley, J., observes (8) that "where the value of the reversion is only altered by collateral circumstances, the covenant will not bind the assignee." In this case the fact of the occupier being convicted of shooting without a certificate cannot affect the value of the premises directly. The offence is not proved to have been committed on the land demised; and the condition, being perfectly general in its terms, applies to offences wherever committed.

[CLEASBY, B., referred to *Roe* d. *Hunter* v. *Galliers* (9), and *Doe* d. *Bridgman* v. *David* (10), as shewing that a proviso for re-entry, in the event of the insolvency of the lessee, his executors, administrators, or assigns, enabled the lessor to determine the lease in case of the *assigns'* insolvency.]

The insolvency of a tenant would probably deprive the lessor of his chance of obtaining rent, and might thus materially injure the

(1) 12 East, 464.
(2) 5 B. & A. 1.
(3) 4 B. & A. 266.
(4) Peake, 131.
(5) Law Rep. 2 Q. B. 200.
(6) 1 Smith's L. C. 6th ed. at p. 51.
(7) 10 East, 130.
(8) 10 East, at p. 138.
(9) 2 T. R. 133.
(10) 1 C. M. & R. 405.

1868

STEVENS v. COPP.

value of the property. [He also cited *Purfrey's Case* (1); *Collison* v. *Lettsom* (2); *Lucas* v. *How* (3); *Chaworth* v. *Phillips* (4); *Keppel* v. *Bailey*. (5)]

KELLY, C.B I am of opinion that this rule should be made absolute, but exclusively, as far as I am concerned, on the ground that the offence of which the defendant was convicted, viz., of shooting game without a licence, is not an offence against the "game laws" within the meaning of the condition, under our consideration. That condition is as follows:—[The learned judge here read it from the lease.] And the circumstance that the defendant has been convicted of shooting without a licence does not seem to me to bring him within its terms. But if it had been necessary to determine the larger question, I must say that I should myself have required stronger arguments and more cogent authorities to satisfy me that the benefit of the condition did not pass to the assignee of the lessor, just in the same manner as a condition that there should be a right of re-entry in case a lessee or his assignee should become bankrupt would pass. That a covenant or condition of the latter sort is one of which an assignee could take advantage appears to me established by the case of *Roe* d. *Hunter* v. *Galliers and Others, Assignees.* (6) There a condition that a lessor, his heirs, or assigns, might re-enter on the bankruptcy of the lessee, his executors, or administrators, was held to be good; and Grose, J., in his judgment in that case, observes (7): "The question is whether the landlord may not stipulate that he will let his land only to the tenant, or to such assignee of the tenant as the landlord shall approve of. I know of no statute or case which says that such a stipulation is bad." If this be so, therefore, I do not see why a stipulation by a landlord that there shall be a right to re-enter, and avoid the lease, if the tenant or any future occupier be convicted of an offence against the game laws, should not be one of which an assignee of the reversion can avail himself. However, although this is the inclination of my opinion, I do not wish to be considered as deciding the point.

(1) Moore, 243.
(2) 6 Taunt. 224.
(3) Sir. T. Raym. 250.
(4) Moore, 876.
(5) 2 My. & K. 517.
(6) 2 T. R. 133.
(7) 2 T. R. at p. 140.

1868

STEVENS v. COPP.

MARTIN, B. I also think this rule should be made absolute. Looking to the terms of the condition in this lease, the plaintiff in my judgment entirely fails to establish any right of action. At common law it was not possible for an assignee of a reversion to take advantage of any covenant entered into by the original lessor with the lessee and his assignees. But by the statute, 32 Hen. 8, c. 34, he was enabled to avail himself of conditions or covenants which "ran with the land;" and it was laid down in *Spencer's Case* (1), and has never been doubted, that no covenant runs with the land except it touch the thing demised. The same rule must be applied to conditions, for in this respect I can see no distinction between a condition and a covenant. What, then, is the condition here? The first portion of it is as follows: "If the said Jonas Copp, his executors, administrators, or assigns, or any tenant, undertenant, or occupier of the said demised premises, shall be lawfully convicted of committing any trespass on the lands of the said George Acland Barbour," there shall be a right of re-entry. Now this would extend to a trespass on any of the lands of the landlord, wherever they may be, possibly in quite another part of the country. Such a covenant cannot in any sense be said to touch the thing demised.

The lease then proceeds to provide that the landlord may re-enter in case the tenant or occupier be "lawfully convicted of any offence against any of the present or future game laws;" and it is on these words that the contention of the plaintiff mainly rests. If they had been confined to offences against the game laws, committed on the farm demised, it might perhaps be argued that they touched the land. But they go much further, being applicable to offences committed elsewhere, at places wholly separate from the place where this farm is. For example, this lease might be forfeited if an occupier of the farm were convicted of shooting without a license in Northumberland. It is impossible, in my judgment, to hold that such a condition runs with the land. It is therefore one for the breach of which the assignee of the reversion cannot re-enter. This rule must accordingly be made absolute.

CHANNELL, B. I am of the same opinion. The plaintiff here is

(1) 1 Smith's L. C. 6th ed. at p. 51.

1868

STEVENS v. COPP.

not the original lessor, but the assignee of the lessor. The defendant was the occupier of the premises, though *how* he came to be in occupation did not very distinctly appear. This being the position of the parties, the plaintiff, in order to succeed, must pray in aid the statute 32 Hen. 8, c. 34, for at common law he could not have maintained this action. Then, is the condition which was broken within that statute? I do not think it is. It does not, when looked at alone, as we should look at it, in any sense touch the thing demised. It seems to me to be purely collateral, and whatever might be the liability of the occupier to the lessor, certainly the present plaintiff has no right of action against the defendant. With regard to the ground on which the Lord Chief Baron has placed his decision, I offer no decided opinion, but I am inclined to think that the offence of which the plaintiff was convicted was an offence against both the revenue and game laws.

CLEASBY, B. I am of the same opinion. The question appears to me to be simply this: Does this condition touch the thing demised? If it does not, it matters nothing that it touches the personal character of the occupier. Now here the act done had no reference whatever to the land demised, but only to the conduct of the person who happened to be in occupation of the premises. But, in my judgment, the mere circumstance of the offence being committed by the person in occupation does not refer enough to the land itself to enable the assignee of the landlord to enforce a forfeiture for breach of this condition. No case has gone to such a length, and I may add that the reason of the thing seems to me to be adverse to the plaintiff's contention.

Rule absolute.

Attorneys for plaintiff: *Wood, Street, & Hayter, for Paul & James, Exeter.*

Attorneys for defendant: *Coode, Kingdon, & Cotton, for Floud, Exeter.*

THE EXECUTORS OF ROBERT COBBOLD PERRY, DECEASED, *v.* THE QUEEN.

1868
Nov. 24.

Probate Duty—The Wills Act (7 *Wm.* 4, 1 *Vict. c.* 26), *s.* 33—55 *Geo.* 3, *c.* 184, *Sch. part* 3—*Decease of Legatee, leaving issue, in the lifetime of Testator.*

A testator bequeathed his personal estate to his son, who died in his father's lifetime, leaving issue :—

Held, that the executors of the son were chargeable with probate duty on the amount of the bequest, in the same manner as they would have been had the son actually survived the father.

THIS was a petition of right by the executors of Robert Cobbold Perry under the following circumstances :—

Robert Perry made his will on the 8th of September, 1857, and thereby bequeathed to his son, Robert Cobbold Perry, his farm, situate in the parishes of Somersham and Little Blakeham, called Holbecks, in the county of Suffolk; also every portion of property he possessed at the time of his decease, not thereinbefore named, and all such as was invested in the public funds, to be for the whole and sole use of R. C. Perry, his heirs and assigns. The residue of his property was also bequeathed to the same legatee, who was appointed sole executor of the will.

Robert Cobbold Perry made his will on the 20th of April, 1864, and thereby devised and bequeathed all his real estate and all the residue of his personal estate to the suppliants and James Willis, since deceased, upon certain trusts for the benefit of his children and of others ; and the suppliants and the said James Willis were appointed executors of his will. He died on the 21st of August, 1864, without having revoked his will, and the said Robert Perry died on the 9th of January, 1865, without having revoked his will. Robert Cobbold Perry left one son and three daughters him surviving, all of whom survived the said Robert Perry. The will of Robert Cobbold Perry was proved by the suppliants and the said James Willis on the 10th of March, 1865, and to them letters of administration with the will of Robert Perry annexed were also granted.

The personal estate and effects of Robert Cobbold Perry, in respect of which probate was granted, exclusive of what he was

1868

EXECUTORS OF PERRY v. THE QUEEN.

possessed of or entitled to as a trustee, and not beneficially, was at the time of probate estimated to be of the value of 50,000*l.*, and under the value of 60,000*l.* The amount of stamp duty paid by the suppliants in respect of such probate, was 750*l.*, pursuant to the statute 55 Geo. c. 184, sched. part 3.

The estate and effects of the said Robert Perry in respect of which administration was granted as aforesaid, exclusive of what Robert Perry was possessed of or entitled to as a trustee and not beneficially, was at the time of probate estimated to be of the value of 60,000*l.* and under the value of 70,000*l.*, but the true value thereof was afterwards ascertained to be upwards of 58,000*l.* The amount of stamp duty paid by the suppliants in respect of such administration was 900*l.*, pursuant to the above statute.

The estimated value of the personal estate and effects of Robert Cobbold Perry, in respect of which the duty of 750*l.* was paid, was made up of the estimated value of the personal estate and effects which were of Robert Cobbold Perry at the time of his death, with the addition of the share of the personal estate and effects of Robert Cobbold Perry to which he would have been entitled, if he had survived, under the will of Robert Perry, but which did not, by reason of his death in the lifetime of Robert Perry, belong to him at the time of his death. The share of the personal estate and effects of Robert Perry to which Robert Cobbold Perry would have been entitled on the death of Robert Perry had he survived him, was of the value of upwards of 46,000*l.* The personal estate of Robert Cobbold Perry, of which he was possessed at the time of his death, was of the value of upwards of 900*l.*; but this was exceeded by the simple contract debts payable, and since paid, out of it.

The suppliants by their petition prayed a return of the amount of 750*l.*, that sum having been paid in respect of property which was not the property of Robert Cobbold Perry at the time of his death. Demurrer, and joinder in demurrer.

Sir J. B. Karslake, A. G. (*Crompton Hutton* with him), for the Crown. The duty is not returnable, because the general rule is that the executors ought to pay on all moneys recoverable by them by virtue of the authority with which the will when proved

1868

EXECUTORS OF PERRY v. THE QUEEN.

clothes them: *The Attorney General* v. *Brunning*. (1) The question as to what are legal and what equitable assets does not arise. Now, here the title of the suppliants depends on the probate of the will of Robert Cobbold Perry, and they are bound to include in their valuation of his estate and effects the bequest to him by his father. Section 33 of the Wills Act (2) puts their testator in exactly the same position as if he had survived his father, for the purposes of probate duty as well as for other purposes. The effect of that enactment is, in point of law, to prolong the life of the legatee. If he had actually survived, the suppliants must certainly have paid duty on the amount of the bequest, and they are none the less liable to pay it now: *Winter* v. *Winter* (3); *Johnson* v. *Johnson*. (4)

C. Pollock, Q.C., for the suppliants. The fiction that a deceased child leaving issue is to be supposed to have survived the testator, ought not to be extended beyond the limits necessary to carry out the purpose of the Wills Act, s. 33: see per Wigram, V.-C. in *Winter* v. *Winter*. (5) In this case there was in reality but one devolution of estate, and only one probate duty ought to be paid: *Platt* v. *Routh* (6); *Drake* v. *The Attorney General*. (7) Suppose R. C. Perry had died intestate, his children would have taken under their grandfather's will directly.

[KELLY, C.B. There must in that case have been letters of administration.]

The amount of the bequest would not have necessarily been included in the estimate of the administrator, who would only be bound to return property actually possessed by the intestate at the time of his death. *The Attorney General* v. *Brunning* (1) is not in

(1) 8 H. L. 243; 30 L. J. (Ex.) 379.

(2) The Wills Act (7 Wm. 4, 1 Vict. c. 26), s. 33, enacts "that where any person, being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator, leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise and bequest shall not lapse but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appear by the will."

(3) 5 Hare, 306.

(4) 3 Hare, 157.

(5) 5 Hare, at p. 313.

(6) 6 M. & W. 756.

(7) 10 C. & F. 257.

1868

EXECUTORS OF PERRY v. THE QUEEN.

point. There the decision was merely that for the purposes of probate duty, property ordered to be converted into personalty was to be deemed actually converted on the principle that "equity considers that done which ought to be done."

KELLY, C.B. In this case it appears that one Robert Perry was possessed, at the time of his making his will in 1857, of certain personal estate and effects, which he bequeathed to his son Robert Cobbold Perry. The son predeceased the father, and therefore but for the 33rd section of the Wills Act (7 Wm. 4, 1 Vict. c. 26), the legacy would have been a lapsed legacy. By that section, however, it is enacted that where any person, being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator, leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will. Now here, Robert Cobbold Perry left issue, and accordingly his father's bequest to him took effect as if he had survived his father. But if in fact he had survived him, his executors on his death would certainly have been liable to pay probate duty, and the question is whether it is not equally payable now by them. I am of opinion that it must be paid, the Wills Act having placed the deceased Robert Cobbold Perry in exactly the same position as if he had survived his father. His executors can only recover and are only entitled to the money left to him by his father, under and by virtue of the will whereby they have been appointed: and in *The Attorney General* v. *Brunning* (1), it was expressly laid down that probate duty is payable on all assets, legal or equitable, recoverable by virtue of the probate. The legacy in this case, though in one sense it may be said to pass direct from Robert Perry to the legatee of Robert Cobbold Perry, still, in law must be taken to pass through R. C. Perry, and forms part of the estate which his executors became possessed of under his will.

(1) 8 H. L. 243; 30 L. J. (Ex.) 379.

1868

EXECUTORS OF PERRY v. THE QUEEN.

I therefore think our judgment must be for the Crown. The language of the Wills Act clearly enacts that where the circumstances shall be as they are here, the case shall be considered the same as if the son survived the father. If Robert Cobbold Perry had survived Robert Perry this duty must have been paid, and it is in my opinion none the less payable now.

MARTIN, B. I am of the same opinion. The case appears to me to resemble one in which a testator is entitled to money on a contingency. Then, until that contingency has failed to happen, the executors cannot save probate duty. Now, here the contingency was the father's death. Until that occurred, the testator, Robert Cobbold Perry, was not entitled to the property bequeathed to him. But the contingency has since happened, and the property has become part of the personal estate of Robert Cobbold Perry, and as such passes to his executors to distribute under his will. It is therefore liable to probate duty, in my judgment, just in the same manner as if he had outlived his father.

BRAMWELL, B. I am of the same opinion. The construction which has been put upon the Wills Act, s. 33, and with which I agree, shews that the property vests in the personal representatives of the deceased legatee; it is therefore a part of his personal estate. Then it is argued that although this is so, still the estate is not the personal estate of the deceased for probate duty purposes. I cannot see why it should not be. Take a similar case. Suppose a man dies with a debt that may be termed a desperate debt due to him. His executors are not bound to include it in the accounts of the estate. But suppose that afterwards somebody leaves a sum of money to pay it off to the creditor, and it is paid off. It would then become part of the estate of the deceased, and an augmentation of the probate duty would be made.

The only difficulty I have felt on the question arises from the provisions of the Stamp Act, 55 Geo. 3, c. 184. By s. 38 an affidavit, before granting probate, is required of the "estate of the deceased;" and it might be argued that this affidavit must refer only to the then actually existing condition of things. Now, no doubt a legacy such as the one in this case, was not part of R. C. Perry's present estate at his death. The father might at any time

1868

Exchequer Pleas.

The Crown

have revoked his will, and therefore it can hardly be considered as money to be paid on a contingency. But there was nevertheless the possibility of benefit, and the benefit having actually accrued it must be taken into account. I therefore agree that our judgment ought to be for the Crown.

CLEASBY, B. I am of the same opinion. The personal estate could at common law only have vested in Robert Cobbold Percy if he had survived his father. But the effect of the Wills Act, s. 33, is for many purposes to place a legatee, who has been dead, but does himself before the testator, in the same position as if he had survived the testator; and I think that he is in the same position for the purposes of probate duty. It would be impossible, in my opinion, to hold otherwise, consistently with the authorities. Our judgment must therefore be for the Crown.

Judgment for the Crown.

Attorney for the Crown: *The Solicitor to the Inland Revenue.*
Attorneys for suppliants: *Rhodes, Son, & Pugsley.*

Dec. 3.

[IN THE EXCHEQUER CHAMBER.]

HYDER *v.* WOMBWELL.

Sale by — Assurance — Position of Judge and Jury — Evidence.

Where in a plea of *coverture*, in an action for goods supplied, the plaintiff replies that they were necessaries for the support of "coverture" as "her necessaries" is one of fact, and therefore for the jury. But, like all other questions of fact, it should not be left to the jury by the judge, unless there is evidence on which they can reasonably find in the affirmative.

The plaintiff sued the defendant's wife for the price of a pair of pantaloons, silkettes waistcoats, &c., and of an antique carved watch. The latter, which the plaintiff knew, when he supplied it, was intended as a present. The defendant was the son of a baronet, with an independent establishment, and in the receipt of an allowance of 400*l.* a year. The question whether these articles were necessaries or not was left to the jury, who found that they were, and a verdict for the plaintiff for 60*l.* 12*s.* was accordingly entered. The Court in Exchequer subsequently held, first (Kelly, C.B., dissenting), that there was no evidence for the jury to say that the articles being a necessary, and that therefore the verdict ought to be entered for the plaintiff; and secondly (Pollock, B., dissenting), that there was evidence which

was properly left to the jury, and how much they might have considered that the *evidence were inconclusive:—*

1868.

Held (reversing on the second point the judgment of the Court below), that there was no evidence of what articles were a necessary, and that a nonsuit ought to have been directed.

Rowe v. Wiseman.

Quære, whether on the trial of an action for goods sold and delivered, where such articles as a necklace or ornaments to a pair of mittens, it is competent on the part of the defendant to prove that when the goods were supplied to him he was already sufficiently provided, but not to the knowledge of the *plaintiff, with other goods of a similar description.*

Appeal from the decision of the Court of Exchequer making absolute so much of a rule as called on the plaintiff to show cause why a verdict found for him for 90*l.* 15*s.* should not be reduced by 12*l.* 15*s.*; and discharging the residue of it, which called upon him to show cause why a nonsuit should not be entered; or a new trial had, on the ground of the improper rejection of evidence. (1)

The declaration was for money payable for goods sold and delivered. Plea: Infancy. Replication: Necessaries. Issue thereon.

At the trial before Kelly, C.B., at the London sittings after Trinity Term, 1867, it appeared that the plaintiff sought to recover for the following (among other) articles of jewelry supplied by him to the defendant, a minor:—First, a pair of crystal, ruby, and diamond solitaires, 2*l.*; and, secondly, a silver gilt antique chased goblet, engraved with an inscription, 15*l.* 15*s.*

The defendant was the younger son of a deceased baronet of large property in Yorkshire, and during his minority had an income of about 500*l.* per annum, and on attaining his majority he came into 20,000*l.* He had no residence of his own, but occasionally stayed at Limmer's Hotel, Bond Street, London; his home was his mother's house in London, and his brother's in Yorkshire, at each of which he was boarded and lodged gratuitously. He pursued no trade or profession, he moved in the highest society, and was in the habit of giving races for his friends, amongst others for the Marquis of Hastings, at whose house he was a frequent visitor, and for whom the goblet was intended, as the plaintiff knew when he supplied it, as a present. The solitaires were ornamental studs or buttons worn by gentlemen as fastenings for the wristbands of the shirt; they were made of crystals set in gold,

(1) Law Rep. 3 Ex. 90.

1868

RYDER v. WOMBWELL.

and ornamented with diamonds representing a horse-shoe in which the nails were represented by rubies.

Evidence was offered on the part of the defendant, that, at the time of the purchase of the solitaires, he had purchased similar articles of jewelry to a large amount from other tradesmen, which rendered any further supply by the plaintiff unnecessary; but, as it was proved that the plaintiff was not aware of this fact, the Lord Chief Baron rejected the evidence.

The jury, in answer to the questions left to them by the learned judge, found that the solitaires and the goblet were necessaries suitable to the estate and condition in life of the defendant, and a verdict was accordingly entered for the plaintiff for 40*l.* 15*s.*, being the price of the solitaires and goblet, with leave to move to enter a nonsuit if the Court should be of opinion that there was no evidence for the jury that either article was a necessary; or to reduce the damages by the price either of the solitaires or the goblet, if the Court should be of opinion that there was evidence for the jury in respect of one or other of these articles only. A rule nisi was obtained accordingly, and also for a new trial, on the ground of the improper rejection of the evidence offered on the part of the defendant, that the defendant was, at the time he purchased the solitaires of the plaintiff, supplied already, although not to the knowledge of the plaintiff, with similar articles. This rule was afterwards made absolute to reduce the verdict by 15*l.* 15*s.*, the price of the goblet, and discharged as to the residue; the majority of the Court being of opinion that the verdict of the jury as to the solitaires ought not to be disturbed, and that the evidence offered to prove that the defendant, when the solitaires were supplied, was already sufficiently supplied with articles of a similar description, was, under the circumstances, properly rejected.

June 20, 1868. *Bulwer, Q.C.* (*Mayd* with him), for the defendant, contended, first, that a nonsuit ought to be entered, as there was no evidence proper to be left to the jury that the solitaires were necessaries. In addition to the cases referred to in the Court below, he cited *Rainsford* v. *Fenwick* (1); *Greene* v. *Chester* (2); *Ive* v. *Chester* (3); and *Wittingham* v. *Hill* (4); to show that in

(1) Carter, 215.
(2) 2 Rolle, 144.
(3) Cro. Jac. 560.
(4) Cro. Jac. 494.

former times, when a more precise and accurate form of pleading prevailed, the facts relied upon as showing that the goods supplied were necessaries were stated upon the record, and the Court were enabled to give judgment whether in point of law the replication was sufficient. But when it was established (see Coke's Entries, Debt. 8, p. 125, and *Huggins* v. *Wiseman*) (1) that the plaintiff might reply in the general form now in use, it became necessary that the facts which used formerly to be stated on the record should be found by a jury, and then the Court had to determine, as formerly, whether the facts found did, in point of law, furnish an answer to the plea. He contended, secondly, that the evidence was improperly rejected; and on this point referred to the following additional authorities: *Story and Another* v. *Perry* (2); *Cook* v. *Deaton* (3); *Ford* v. *Fothergill* (4); *Steedman* v. *Rose* (5); *Berrolles* v. *Ramsay* (6); *Brayshaw* v. *Eaton* (7); *Foster* v. *Redgrave* (8); Chitty on Contracts, 6th ed. pp. 136, 137, 140; Leake on Contracts, p. 233.

(1) Carth. 110.
(2) 4 C. & P. 526.
(3) 3 C. & P. 114.
(4) 1 Esp. 211.
(5) Car. & M. 422.
(6) Holt, N.P. 77.
(7) 7 Scott, 183.

(8) Queen's Bench, Feb. 9, 1867.—*Foster* v. *Redgrave*.—This was a cause tried before Keating, J., at the Berkshire summer assizes, 1866. The declaration was on the common counts for goods sold and delivered, &c. Plea: Infancy. Replication: Necessaries.

It appeared on the trial that the defendant, an undergraduate at Oxford, had, whilst a minor, been supplied by the plaintiff, a tradesman in Oxford, with a number of articles of clothing which were admitted to be "necessaries" primâ facie. The defence was, that the defendant was, at the time the goods were ordered and supplied, already provided with an ample wardrobe. It was not suggested, however, that the plaintiff knew of this fact.

The learned judge left it to the jury to say whether, under these circumstances, the goods supplied were necessaries. The jury found that they were, and a verdict was thereupon entered for the plaintiff, with leave to move to enter a nonsuit. A rule was afterwards obtained accordingly on the ground that the defendant, being already fully supplied with articles of the same description as those sold to him by the plaintiff, those could not be "necessaries," and therefore that the plaintiff was not entitled to recover.

J. O. Griffits shewed cause, and contended that, unless the plaintiff was proved to have had knowledge that the defendant was already sufficiently provided with articles of a similar description to those supplied, his right to recover remained unaffected by the circumstance that, in point of fact, the defendant was so provided.

THE COURT (Blackburn and Mellor, JJ.), without calling on *Huddleston*,

1868

RYDER v. WOMBWELL.

Popham Pike (*Coleridge, Q.C.*, with him), for the plaintiff, contended that the question whether the solitaires were necessaries was rightly left to the jury, and that they had come to a right conclusion. He cited, in addition to the authorities quoted in the Court below, *Hands* v. *Slaney*. (1)

With regard to the rejection of evidence, there was no case similar to the present. In all of those cited in order to shew that the evidence was admissible, though not brought to the plaintiff's knowledge, there were peculiarities. Either they were cases of husband and wife, or else of minors, in respect of whom there was a presumption that they were already supplied with all necessaries by reason of their living in their father's houses, or of their being in statu pupillari. Again, in many of the cases cited the tradesmen had peculiar facilities for knowing the actual position of the minor. Putting aside particular and exceptional cases there seemed to be no difference between a minor being actually supplied with goods similar to those for the price of which he was being sued, and his being in the receipt of an income sufficient to buy them if he chose. Yet the amount of an infant's income had been held immaterial: *Brayshaw* v. *Eaton*. (2) Why should the amount of his income when he had turned his money into goods be material?

Bulwer, Q.C., in reply.

Cur. adv. vult.

Dec. 3, 1868. The judgment of the Court (Willes, Byles, Blackburn, Montague Smith, and Lush, JJ.) was delivered by

WILLES, J. In this case the plaintiff replied to a plea of infancy, that the goods were necessaries suitable to the degree, estate and condition of the defendant, and on this issue was taken. On the trial before the Lord Chief Baron it was proved that the degree, estate and condition of the defendant was that he was the younger son of a deceased baronet of good fortune and family, that during his minority he had an income of about 500*l.* per

---

Q.C., to support the rule, made it absolute on the authority of *Bainbridge* v. *Pickering* (2 Wm. Bl. 1325), and *Brayshaw* v. *Eaton* (7 Scott, 183).

(1) 8 T. R. 578.

(2) 7 Scott, 183.

annum, and on attaining his majority he became entitled to 20,000*l.*, that he moved in what is called the highest society, and rode races for a friend, the Marquis of Hastings, at whose house he was a frequent visitor. Amongst the articles supplied by the plaintiff upon credit, and which, according to his case and the verdict of the jury, were necessaries for an infant of this degree, were a silver-gilt goblet which he ordered for the purpose of making a present to the Marquis of Hastings, price 15*l.* 15*s.*, and a pair of solitaires or ornamental studs, worn as the fastenings of the wrist-bands of a shirt, which it is stated in the case were made of crystals set in gold and ornamented with diamonds, representing a horseshoe in which the nails were rubies. The price of these studs or solitaires was 25*l.* No evidence was given of anything peculiar in the defendant's station rendering it exceptionally necessary for him to have such articles.

At the close of the plaintiff's case the defendant's counsel offered evidence that the defendant was already supplied with similar articles of jewelry to a large amount, so as to render any further supply unnecessary, but it being admitted that the plaintiff was not aware of this, the Lord Chief Baron rejected this evidence.

Leave was reserved to move to enter a nonsuit or reduce the damages, and the question whether these two articles were, under the circumstances, necessaries, was left to the jury, who found for the plaintiff as to both of the articles above mentioned. They found for the defendant as to some other articles which it is consequently not necessary to notice. A rule nisi was obtained in the Court of Exchequer to enter a nonsuit or reduce the verdict pursuant to the leave reserved, or for a new trial on the ground of the improper rejection of evidence.

The rule was by the majority of the Court of Exchequer made absolute, to reduce the damages to 25*l.*, the value of the studs, thus deciding that there was no evidence on which the jury could find that it was necessary for the infant to buy on credit a goblet for the purpose of making a present, but that there was evidence on which they might find that it was necessary for him to buy such studs as are above described, and the rule for a new trial on the ground of the rejection of evidence was discharged. Bramwell, B., dissented from this judgment, as in his opinion there was no

1868

RYDER v. WOMBWELL.

evidence to go to the jury; and the evidence rejected was admissible.

On appeal, therefore, there are two questions raised before us: first, whether there was evidence on which the jury might properly find that both or either of those articles were necessaries, on the determination of which depends whether the verdict should be restored to a verdict for the whole amount of 40*l.* 15*s.*, or stand reduced to 25*l.*, or be altogether set aside and a nonsuit entered. Secondly, whether the evidence offered was admissible; the determination of which only affects the question whether there should be a new trial or not.

The general rule of law is clearly established, and is that an infant is generally incapable of binding himself by a contract. To this rule there is an exception introduced, not for the benefit of the tradesman who may trust the infant, but for that of the infant himself. This exception is that he may make a contract for necessaries. And as is accurately stated by Parke, B., in *Peters* v. *Fleming* (1), "From the earliest time down to the present the word necessaries is not confined in its strict sense to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, station and degree in life in which he is; and therefore we must not take the word necessaries in its unqualified sense, but with the qualification above pointed out. Then the question in this case is whether there was any evidence to go to the jury that any of these articles were of that description." In the present case the first question is whether there was any evidence to go to the jury that either of the above articles was of that description. Such a question is one of mixed law and fact; in so far as it is a question of fact it must be determined by a jury, subject no doubt to the control of the Court, who may set aside the verdict and submit the question to the decision of another jury; but there is in every case, not merely in those arising on a plea of infancy, a preliminary question which is one of law, viz., whether there is any evidence on which the jury could properly find the question for the party on whom the onus of proof lies. If there is not, the judge ought to withdraw the question from the jury and direct a nonsuit if the onus is on the plaintiff

(1) 6 M. & W. at p. 46.

or direct a verdict for the plaintiff if the onus is on the defendant. It was formerly considered necessary in all cases to leave the question to the jury if there was any evidence, even a scintilla, in support of the case; but it is now settled that the question for the judge (subject of course to review) is, as is stated by Maule, J., in *Jewell* v. *Parr* (1), not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established. In *Toomey* v. *London and Brighton Railway Company* (2), Williams, J., enunciates the same idea thus: "It is not enough to say that there was some evidence. . . . A scintilla of evidence . . . clearly would not justify the judge in leaving the case to the jury. There must be evidence on which they might reasonably and properly conclude that there was negligence,"—the fact in that case to be established. And in *Wheelton* v. *Hardisty* (3), in the considered judgment of the majority of the Court, it is said, "The question is, whether the proof was such that the jury would reasonably come to the conclusion" that the issue was proved. "This," they say, "is now settled to be the real question in such cases by the decisions in the Exchequer Chamber, which have in our opinion so properly put an end to what had been treated as the rule, that a case must go to the jury if there were what had been termed a scintilla of evidence." In this Lord Campbell agreed, though differing as to the result. (4) And taking that as the proper test, we think that there was not in this case evidence on which the jury could reasonably find that it was necessary for maintaining the defendant in the station of life in which he moved, either that he should give goblets to his friends or wear shirt-buttons composed of diamonds and rubies costing 12*l.* 10*s.* a piece.

We must first observe that the question in such cases is not whether the expenditure is one which an infant, in the defendant's position, could not properly incur. There is no doubt that an infant may buy jewelry or plate, if he has the money to pay and pays for it. But the question is whether it is so necessary for the purpose of maintaining himself in his station that he should have these articles, as to bring them within the exception under which

(1) 13 C. B. at p. 916.
(2) 3 C. B. (N.S.) at p. 150.
(3) 8 E. & B. at p. 262.
(4) See 8 E. & B. at p. 266.

1868

RYDER v. WOMBWELL.

an infant may pledge his credit for them as necessaries. The Lord Chief Baron, in his judgment, questions whether under any circumstances it is competent to the judge to determine as a matter of law, whether particular articles are or are not to be deemed necessaries suitable to the estate and condition of an infant, and whether, if in any case the judge may so determine, his jurisdiction is not limited to those cases in which it is clear and obvious that the articles in question not merely are not, but cannot, be necessaries to any one of any rank, or fortune, or condition whatever? This is an important principle which, if correct, fully supports the judgment below, but we cannot assent to it. We quite agree that the judges are not to determine facts, and therefore where evidence is given as to any facts the jury must determine whether they believe it or not. But the judges do know, as much as juries, what is the usual and normal state of things, and consequently whether any particular article is of such a description as that it may be a necessary under such usual state of things. If a state of things exist (as it well may) so new or so exceptional that the judges do not know of it, that may be proved as a fact, and then it will be for the jury under a proper direction to decide the case. But it seems to us that if we were to say that in every case the jury are to be at liberty to find anything to be a necessary, on the ground that there may be some usage of society, not proved in evidence and not known to the Court, but which it is suggested that the jury may know, we should in effect say that the question for the jury was whether it was shabby in the defendant to plead infancy.

We think the judges must determine whether the case is such as to cast on the plaintiff the onus of proving that the articles are within the exception, and then whether there is any sufficient evidence to satisfy that onus. In the judgment of Bramwell, B. in the Court below, many instances are put well illustrating the necessity of such a rule. It is enough for the decision of this case if we hold that such articles as are here described are not primâ facie necessary for maintaining a young man in any station of life, and that the burthen lay on the plaintiff to give evidence of something peculiar making them necessaries in this special case, and that he has given no evidence at all to that effect.

The cases will, we think, be found to be quite consistent with

this view. In *Peters* v. *Fleming* (1), the Court took judicial notice that it was primâ facie not unreasonable that an undergraduate at college should have a watch, and consequently a watch chain, and that therefore it was a question for a jury whether the watch chain supplied on credit in that particular case was such a watch chain as was necessary to support himself properly in his degree. In laying down the law as to the particular case, Parke, B., says (2): "All such articles as are purely ornamental are to be rejected, as they cannot be requisite for any one." Possibly there may be exceptional cases in which things purely ornamental may be necessary. In such a state of things as we believe existed at the close of the last century it might have been a question for a jury whether it was not necessary, for the purpose of maintaining his station, for a young gentleman moving in society to purchase wigs and hair powder; but as a general rule, and in the absence of some evidence to shew that the usages of society required the use of such things, we think the rule laid down in *Peters* v. *Fleming* (2) is correct. It was approved of in *Wharton* v. *Mackenzie* (3), where Coleridge, J., says (4), that in some cases it must be for the judge to decide the question. Where evidence is given, as he observes, of exceptional circumstances, the case must go to the jury with proper directions, but in the absence of any explanation the Court will decide. So in *Brooker* v. *Scott* (5), Parke, B., during the course of the argument, says (6): "Primâ facie, these articles are not necessaries under the circumstances, and the tradesmen must shew them to be so;" and in giving judgment he says (7): "If there had been any explanation of the circumstances under which they were supplied, it might possibly have varied the case, but no explanation whatever is given of them;" and on that ground a nonsuit was entered.

No doubt there are many cases in which the Court have held that such evidence had been given, and that the case could not be withdrawn from the jury, several of which are cited by the Lord Chief Baron in his judgment, but none in which it is laid down that the Court is bound to consider itself ignorant of every usage of mankind, and therefore bound, in the absence of all evidence on the subject,

(1) 6 M. & W. 42.
(2) 6 M. & W. at p. 47.
(3) 5 Q. B. 606.
(4) 5 Q. B. at p. 612.
(5) 11 M. & W. 67.
(6) 11 M. & W. at p. 68.
(7) 11 M. & W. at p. 69.

1868

RYDER v. WOMBWELL.

to take the opinion of a jury as to whether it is not so necessary for a gentleman to wear solitaires of this description, that, though an infant, he must obtain them on credit rather than go without.

There is, no doubt, a possibility in all cases where the judges have to determine whether there is evidence on which the jury may reasonably find a fact, that the judges may differ in opinion, and it is possible that the majority may be wrong. Indeed, whenever a decision of the Court below on such a point is reversed, the majority must have been so either in the Court above or the Court below. This is an infirmity which must affect all tribunals. But in the present case we do not think any such case has arisen, for we do not understand any of the judges to proceed on the ground that they think that, in fact, the solitaires of this expensive character were shirt buttons really got for utility, and that the degree of ornament was only accidental, or that the jury were not wrong if they so found, but on the ground that it was not a question for the Court at all.

Taking this view of the law and facts, it follows that the judgment should be reversed, and a nonsuit entered. It becomes therefore unnecessary to decide whether the evidence tendered was properly rejected or not. That is a question of some nicety, and the authorities are by no means uniform. In *Bainbridge* v. *Pickering* (1) the Court of Common Pleas seem to have acted on a principle which would make the evidence admissible. In *Brayshaw* v. *Eaton* (2), Bosanquet, J., treats it as clearly admissible, and on those authorities the Court of Queen's Bench (then consisting of Blackburn, J., and Mellor, J.) acted in *Foster* v. *Redgrave*. (3) There is much to be urged in support of the view taken by the majority in the Court below, and we desire not to be understood as either overruling or affirming that decision. If ever the point again arises, the court before which it comes must determine it on the balance of authority and on principle, without being fettered by a decision of this Court.

Judgment reversed, and a nonsuit entered.

Attorney for plaintiff: *Edmund F. Davis.*

Attorney for defendant: *Henry Tyrrell.*

(1) 2 Wm. Bl. 1325. (2) 7 Scott, 183. (3) Antè p. 35, n. (8)

Applied. MARRIAGE *v.* EAST NORFOLK RIVERS CATCHMENT BOARD. [1949] 2 All E.R. 50.

HARROP AND ANOTHER *v.* HIRST. 1868 *Nov.* 24.

Action for Infringement of Legal Right—Right of Action without actual Damage—Act done by One in derogation of right of another—Right of Inhabitants of a District to have Water from a Spout in a Highway—Abstraction by Riparian Owner.

The plaintiffs, in common with the other inhabitants of a particular district, enjoyed a customary right at all times to have water from a certain spout in a highway in the district for domestic purposes. The defendant, a riparian owner on the stream whereby the spout was supplied with water, on various occasions prevented such large quantities of water from reaching the spout as to render what remained insufficient for the needs of the inhabitants. The plaintiffs had not themselves ever suffered any actual personal damage or inconvenience:—

Held, that an action for diverting the water was maintainable without proof of any actual personal damage, inasmuch as the act of the defendant might, if repeated often enough without interruption, furnish evidence in derogation of the plaintiffs' legal rights.

DECLARATION, that from time whereof the memory of man is not to the contrary there was of right and still is a certain public waterspout in a public highway called Kiln Lane, within the district of Tamewater, in the parish of Saddleworth, in the West Riding Division of the county of York, and during all that time the water of a certain spring of right flowed and of right ought to flow from the said spring along a certain watercourse to the said spout, and by an ancient and laudable custom and usage of the said district the inhabitants thereof, for the time being, were and are entitled to take and use water from the said spout for culinary and other domestic purposes to be used in their respective dwelling houses for the more convenient use and occupation thereof; that the plaintiffs were inhabitants of the district, and in joint occupation of a dwelling house within it, and were as such inhabitants entitled to take and use water from the spout for culinary and other domestic purposes; yet the defendant, well knowing the premises, on divers days wrongfully diverted large quantities of water which ought and otherwise would have flowed along the said watercourse into the said spout, whereby the said spout became insufficiently supplied with water for the purposes aforesaid, and the plaintiffs were hindered from using the water to which they were entitled, and were put to expense and inconvenience.

1868

HARROP v. HIRST.

[In a second count the plaintiffs claimed the same privileges as in the first count, by virtue of a private, and not a customary, right.]

Pleas: 1. Not guilty. 2. To the first count, traverse of the existence of the water spout, and the flow of the water in the manner and for the purposes therein alleged. 3. To the same, traverse of the custom or usage of the district. 4. To the same, traverse that the plaintiffs were entitled to take and use water from the spout.

[There were further pleas to the second count, traversing the material averments in it, and to the whole declaration, of leave and license, and the statute of limitations.]

Issue thereon.

The cause was tried at the Leeds summer assizes, 1868, before Bramwell, B., when the customary right of the plaintiffs in common with the other inhabitants of the district of Tamewater to take and use water from the spout in question for culinary and other domestic purposes was proved. It was also proved that at various times the defendant, who was the riparian owner of the property through which the stream whereby the spout was supplied passed, had abstracted water in such quantities as to render what remained insufficient to meet the exigencies of the inhabitants. Certain of the inhabitants of the district had on different occasions gone to draw water and had found none, but the jury, while affirming the existence of the alleged right, and the infringement of it from time to time by the defendant, found that the plaintiffs had never themselves suffered any actual personal damage either by loss of time or money, and had not been put to any sensible or substantial inconvenience of any sort by the defendant's acts. A verdict was, under these circumstances, entered for the plaintiffs, damages 40*s.*, with leave to move to enter a nonsuit.

A rule was obtained accordingly, on the ground that the plaintiffs had not sustained any actionable damage.

Field, Q.C., and *A. Wills*, shewed cause. The plaintiffs' rights have been infringed, and they are entitled to recover without shewing any special damage. No indictment could be maintained against the defendant, and the case therefore does not come under the rule which provides that where an indictment is maintainable,

no person, except one specially injured over and above the rest of the Queen's subjects, can maintain an action. Here the defendant has done an act which, if repeated without restraint, might eventually deprive the plaintiffs of their right to the customary flow of water from the spout for domestic purposes: *Wood* v. *Waud* (1); *Westbury* v. *Powel*, cited in *Fineux* v. *Hovenden* (2), *Reg.* v. *Thrower* (3); *Austin's Case.* (4)

[MARTIN, B. The test is, whether the doing of the acts complained of would, if continued, bar another person's legal right. If it would, then according to the principle laid down in the note to *Mellor* v. *Spateman* (5), an action is maintainable without proof of individual damage.]

That is the true rule, and has been acted on in many cases. See *Marzetti* v. *Williams* (6), *Bower* v. *Hill* (7), *Embrey* v. *Owen* (8), *Sampson* v. *Hoddinott.* (9)

Price, Q.C., and *Kemplay*, in support of the rule. This is not an action by one riparian proprietor against another, but by one of the public against a riparian owner. It is not denied that the defendant did diminish the flow of water on various occasions to an appreciable extent, but that circumstance does not give a person who has suffered no particular damage a right of action against him: Addison on Torts, 2nd ed., p. 58. If the defendant had committed an indictable nuisance, then it is conceded that no action would lie without special damage. But although the act done could not be made the subject of indictment, the question whether an action is maintainable or not must be determined by analogous principles. No right could be gained against the plaintiffs by the occasional diminution of the supply of water, and unless the act done is in derogation of the rights of some ascertained individual, it is not actionable unless particular damage is shewn: Mayne on Damages, 256, 257; *Pindar* v. *Wadsworth* (10); *Hobson* v. *Todd.* (11)

KELLY, C.B. The plaintiffs claim, with other persons, inhabit-

(1) 3 Ex. 748.
(2) Cro. Eliz. 664.
(3) 1 Ventr. 208; 3 Keb. 28.
(4) 1 Ventr. 189.
(5) 1 Wms. Saund. 346, a.
(6) 1 B. & Ad. 415.
(7) 1 Scott, 526.
(8) 6 Ex. 353; 20 L. J. (Ex.) 212.
(9) 1 C. B. (N.S.) 590.
(10) 2 East. 154.
(11) 4 T. R. 71.

1868

HARROP v. HIRST.

ants of the same district as themselves, a right to a continuous flow of water for domestic purposes from a spout situated in the street of Tamewater, in the parish of Saddleworth, in the West Riding of Yorkshire. The defendant is the occupier and owner of certain land through which the stream in which the spout is dependent for its supply of water, flows; and he has from time to time abstracted water from the stream, to such an extent as to render the amount which reaches the spout to be sometimes insufficient for the supply of the whole district entitled to make use of it. It did not appear, however, at the trial that the plaintiffs themselves had ever suffered any actual personal inconvenience from the want of water, and the question is, whether, under these circumstances, an action is maintainable at their suit—in other words, does such an action lie without proof of any actual personal and particular damage? I think it is clear on the authorities, and especially on the case of *Westbury* v. *Powel*, cited in *Fineux* v. *Hovenden* (1), that such an action is maintainable. It was there determined that where the inhabitants of Southwark had a common watering place, and the defendant stopped it, the plaintiff, being an inhabitant, might bring an action on the case, there being no other remedy but by action; and the action was accordingly held maintainable without actual and particular damage to the plaintiff. Now in this case, when the nature of the right alleged, and of, the infringement complained of, is looked at, viz., the right to the flow of the water, and its abstraction in appreciable quantities from time to time, one cannot but see that the effect of repeated acts of abstraction might furnish the foundation of a claim of right in the defendant, in derogation of the rights of the plaintiffs and the other inhabitants of the district, and render those rights valueless. It is conceded that any inhabitant who had suffered actual damage from want of water could maintain an action for the injury done him. But that actual damage is not in such a case a necessary ingredient, is established by the passage cited by my Brother Martin from 1 Wms. Saunders, 346 (a), in the note to *Mellor* v. *Spateman*, where it is laid down that a commoner may have an action on the case without proving *any specific injury* to himself against a person wrongfully depasturing cattle on the com-

(1) Cro. Eliz. 664.

1868

HARROP v. HIRST.

mon; and the author observes:—"The law considers that the *right* of the commoner is injured by such an act, and therefore allows him to bring an action for it to prevent a wrong-doer from gaining a right by repeated acts of encroachment. For wherever any act injures another's right, and would be evidence in future in favour of the wrong-doer, an action may be maintained for an invasion of the right without proof of any specific injury." The proposition there laid down amounts to this, that wherever one man does an act which, if repeated, would operate in derogation of the right of another, he is liable to an action without particular damage at the suit of the person whose right may be affected. Among the authorities in support of this proposition may be mentioned *Bower* v. *Hill* (1), an action for obstructing the plaintiff's right of way by the erection of a tunnel, where Tindal, C.J., thus expresses himself: "The erection of the tunnel is to be considered as a permanent obstruction to the plaintiff's right, and therefore an injury to the plaintiff, even though he receive no immediate damage thereby. The right of the plaintiff to this way is injured, if there is an obstruction in its nature permanent. If acquiesced in for twenty years, it would become evidence of an abandonment and renunciation of the right of way. That is the ground on which a reversioner is allowed to bring his action." If, then, the defendant in this case, being the owner of lands through which the stream supplying the spout flows, abstracted the water from time to time in such quantities as not to leave enough to meet the exigencies of the inhabitants of the district, he did an act which might be used hereafter as evidence of a right in derogation of the rights of the inhabitants, among whom were the plaintiffs. Therefore, although they themselves suffered no personal or particular actual damage, I am of opinion that they are entitled to maintain this action. This rule must accordingly be discharged.

MARTIN and BRAMWELL, BB., concurred.

CHANNELL, B. I am of the same opinion. It is conceded that where an indictment may be maintained there is no remedy by action without proof of individual damage. But the same principle does not apply where the injury complained of is not one

(1) 1 Scott, 526.

1868

HARROP v. HIRST.

affecting the public generally, but only a particular class or section of persons. It is also conceded that the infringement of a right furnishes a cause of action, but it is said there must be damage of some sort proved, particular to the person who sues. Now here the jury have found that the inhabitants of the district in question, and the plaintiffs among them, have a right, and also that the defendant has at times interfered with that right, but they have also found that the plaintiffs have personally suffered no loss either pecuniarily or by waste of time in going to fetch water in vain, or otherwise. Neither in time nor money have they incurred any appreciable inconvenience. It is, however, admitted that any inhabitant who had actually been injured by the circumstance that the supply of water had been lessened might have maintained an action. But it appears to me that the mere fact of abstracting from time to time the supply of water to which the inhabitants of the district were justly entitled might furnish some evidence in derogation of the rights of those inhabitants, whether on this or that particular occasion they suffered actual damage or not. On that ground I think the plaintiffs are entitled to recover in this action,—on the ground, that is to say, that the act of the defendant was one which derogated, or might hereafter derogate, from their legal right. Therefore this action at their suit is maintainable, in my opinion, without proof of actual individual loss or inconvenience, and the rule must be discharged.

Rule discharged.

Attorneys for plaintiffs: *Learoyd & Bleby.*
Attorneys for defendant: *Johnson & Weatheralls.*

[IN THE EXCHEQUER CHAMBER.]

1868
Dec. 3.

NUSSERWANJEE BOMANJEE MODY AND OTHERS *v.* GREGSON AND OTHERS.

Contract of Sale—Sale of Goods by Sample—Warranty of Merchantable Quality.

The defendants, manufacturers, contracted to supply to the plaintiffs a quantity of grey shirtings according to sample, each piece to weigh 7 lbs. Goods were delivered and accepted according to sample and of the agreed weight; but it was afterwards discovered that the weight was made up by introducing into the fabric 15 per cent. of china clay, which rendered the goods unmerchantable. The presence of the china clay could not be discovered by an ordinary examination of the sample. In an action against the defendants for breach of an implied warranty of merchantable quality:—

Held, that, in the absence of a sample, a warranty of merchantable quality would have been implied; that the selling by sample excluded that implied warranty only with respect to such matters as could be judged of by the sample, and that the action was therefore maintainable.

BILL of exceptions tendered by the defendants to the ruling of Bramwell, B., at the trial of the cause at Guildhall on the 9th of December, 1867.

June 22. The case was argued by *Sir G. Honyman, Q.C.* (*J. A. Russell, Q.C.*, with him), for the plaintiffs; and by *Manisty, Q.C.* (*Kemplay* with him), for the defendants. The pleadings and facts are sufficiently stated in the judgment of the Court. In addition to the cases there referred to, *Shepherd* v. *Pybus* (1), *Brown* v. *Edgington* (2), *Wieler* v. *Schilizzi* (3), *Emmerton* v. *Matthews* (4), and 2 Kent. Com. p. 608 (7th ed.), were cited for the plaintiffs; and Broom's Leg. Max. p. 706 (3rd ed.), *Chanter* v. *Hopkins* (5), and *Bluett* v. *Osborne* (6), for the defendants.

Cur. adv. vult.

Dec. 3. The judgment of the Court (Willes, Blackburn, Keating, Montague Smith, and Lush, JJ.) was delivered by

WILLES, J. This case came before the Court upon a bill of exceptions tendered to the direction of Bramwell, B., at the trial.

The action was for a breach of an alleged contract that, in con-

(1) 3 M. & G. 868.
(2) 2 M. & G. 279.
(3) 17 C. B. 619; 25 L. J. (C.P.) 89.
(4) 7 H. & N. 586; 31 L. J. (Ex.) 139.
(5) 4 M. & W. 399.
(6) 1 Stark. 384.

LONDON UNIV.

1868

Mody v. Gregson.

sideration that the plaintiffs would agree to buy of the defendants 2500 pieces of a certain kind or description of grey shirting at an agreed price, the defendants promised the plaintiffs to deliver the same within an agreed period, and that the same, when so delivered, should be of merchantable quality and in merchantable condition. The alleged breach of contract was, that the goods when delivered were not of merchantable quality and in merchantable condition. The defendants by their pleas denied the contract and the breach of it.

At the trial the facts as collected from the record appeared to be as follows:—The plaintiffs were a firm carrying on business through their manager in London, and the defendants were manufacturers and sellers of grey shirting. The plaintiffs' manager for them instructed Calvert, a commission agent in Manchester, to buy 2500 pieces of grey shirting, and he, on the 24th of December, 1863, received a sample of grey shirting from McConnell & Hardfield, commission agents of Manchester, who were the defendants' agents for the sale of that article there. On the 29th of the same month he purchased of the defendants, through their agents, 2500 pieces of grey shirting according to the sample, at 18*s.* 6*d.* per piece, to be delivered within a certain specified period, and each piece to be of 7 lbs. weight. The defendants, who were themselves the manufacturers of the shirting, delivered to the plaintiffs' agent, under the contract, at different times a quantity of grey shirting, some pieces of which were rejected upon various grounds, and replaced by others, and the plaintiffs' agent ultimately accepted on their behalf 2500 pieces as being according to the sample. At the time he examined and accepted the goods he could not tell whether any material had been put into them to increase their weight, nor whether any foreign ingredient other than the usual and ordinary amount of size had been introduced into them in the process of manufacture. The plaintiffs shipped the goods to Calcutta, where it was discovered that china clay to the extent of more than 15 per cent. of the weight had been introduced into them by the defendants in the process of manufacture, for the purpose only of making them weigh 7 lbs. (the weight contracted for), which they otherwise would not, and that by reason of such introduction the goods were unmerchantable. It does not appear to have been proved dis-

tinctly either that the sample did or that it did not contain the same percentage of china clay as the bulk delivered; it may probably be inferred that it did, from the statement that, by the examination of the sample in the ordinary and accustomed way, the introduction of the china clay into the manufacture could not be discovered and was not known to the plaintiffs.

In this state of facts it was insisted that the defendants were entitled to the verdict, "upon the ground that, upon a sale of goods by sample, no warranty that they were merchantable could be implied." The learned judge, however, directed the jury, that "in the circumstances hereinbefore stated, if the goods in question were bought and sold by sample, and accorded with the sample, still there was an implied warranty that they were merchantable as to such matters as could not be judged of by sample, as there would be if bulk were inspected, and the defect could not thereby be ascertained," and that, if they believed the evidence, they ought to find for the plaintiffs: whereupon the defendants' counsel excepted to the direction "upon the ground that the said Baron ought not to have directed the jury that if the goods in question were bought and sold by sample, and accorded with the sample, still there was an implied warranty that they were merchantable as to such matters as could not be judged of by sample, as there would be if bulk were inspected, and the defect could not thereby be ascertained." The jury found for the plaintiffs.

I have been thus particular in stating the course taken at the trial, in order to shew that no objection of formal variance between the evidence and the count can be relied upon for the defendants; of course no such objection could have been thought of at the trial, because it would at once have been removed by amendment; and the defendants can, therefore, in this Court only rely upon the substantial objection, that a sale by sample excludes the implied warranty that the goods are merchantable, even though their being unmerchantable results from the admixture by the seller of foreign materials for appearance or cheapness sake, of which admixture the sample gives no notice or means of knowledge to a purchaser of ordinary diligence; or, as the defendants in terms insisted at the trial, that "upon a sale of goods by sample no warranty that they were merchantable could be implied."

1868

MODY v. GREGSON.

The sale under consideration was an ordinary mercantile sale of manufactured goods, under the description of pieces of grey shirting, weighing 7 lbs. a piece, and according to the general rule of law acted upon by Lord Ellenborough in *Gardiner* v. *Gray* (1), and elaborately commented upon in the judgment of the Court of Queen's Bench, delivered by Mellor, J. in *Jones* v. *Just* (2), where the authorities are collected and reviewed, had there been no sample, the purchasers not having had an opportunity of inspecting the bulk so as to judge of it for themselves, would have been entitled to receive, not grey shirting of any particular quality, fineness, or make, but merchantable grey shirting of the specified size and weight. "In every contract to supply goods of a specified description which the buyer has no opportunity to inspect, the goods must not only in fact answer the specific description, but must also be saleable or merchantable under that description. In the words of Lord Ellenborough in *Gardiner* v. *Gray*, 'Without any particular warranty this is an implied term in every such contract.' (3)

This rule of law entitling the purchaser in an ordinary commercial bargain for the supply of goods, not specific or agreed upon at the time but described generally as of a designated sort, to receive merchantable goods of that sort, is founded upon an obvious inference from the character of the transaction, that the parties are dealing not for the mere semblance or shadow of the thing designated, but for the thing itself as commonly understood in commerce, with the essential qualities which make it worth buying to a person who wants an article of that designation; in other words, that the buyer and seller, in the absence of anything to shew an intention to the contrary, must be taken as intending to buy and sell respectively a merchantable article of the designated kind.

And "in the circumstances" of this case, to which the direction of the learned judge refers, and must be construed as limited, there would (in the absence of a sample) have been special reasons for applying the general rule in favour of the buyers; because the sellers were the manufacturers of the goods, and it was their act of introducing the china clay, a foreign ingredient, for the purpose

(1) 4 Camp. 144, 145. (2) Law Rep. 3 Q. B. 197.
(3) Law Rep. 3 Q. B. at p. 205.

only of making the apparent weight of each piece up to the 7 lbs. stipulated for by the buyers, that made the goods unmerchantable.

Did then, under these circumstances, the fact of the sale being by sample negative the implied term that the goods should be merchantable? That must depend upon the intention and object of the parties in using a sample; and the object and use of either inspection of bulk or sample alike are to give information, disclosing directly through the senses what any amount of circumlocution might fail to express. It seems difficult, therefore, to ascribe any greater effect to a sample in excluding implication, than would be ascribed to express words in the contract giving, so far as words could give, the same amount of information; and as to such words, the doctrine that an express provision excludes implication (expressum facit cessare tacitum) does not affect cases in which the express provision appears, upon the true construction of the contract, to have been superadded for the benefit of the buyer; as in *Bigge* v. *Parkinson* (1), where a warranty, that the provisions sold should pass the inspection of the East India Company, was held not to exclude the implied warranty of merchantableness.

Doubtless, even in cases where but for the use of a sample there would be an implied term that the bulk was of a certain quality, the use of a sample, which to a person of ordinary diligence and experience would disclose the want of that quality, negatives the implication, because it expresses to the buyer a different intention on the part of the seller; as in the case of sales of damaged or adulterated or otherwise inferior goods by a sample shewing that they are of such character.

And there are other cases in which the sample is given, whether by buyer or seller, under circumstances which make it the only description of the thing to be supplied, and so to constitute the only touchstone of the contract. If, for instance, a person dealing in some white mineral, of which he had found a vein, were to produce a sample and sell by the general description "the stuff of which this is a sample," he would only be bound to deliver stuff the same as the sample, although it should turn out to be unmerchantable and worthless. In such a case the buyer has not stipulated for anything but stuff identical with the sample, whatever it

(1) 7 H. & N. 955, 31 L. J. (Ex.) 301.

1868

MODY v. GREGSON.

might turn out to be; and the result is the same as if there had been simply a purchase of so much of the white mineral itself as it lay, without any designation of kind or quality.

But suppose that the contract had been for the sale of so much china clay or other designated substance known in commerce, according to a sample produced by the seller, which gave the buyer no information that the stuff to be supplied was not of the designated description, and afterwards upon delivery the article, for some defect which could not be discovered in the sample, turned out upon trying to use it in bulk to be unmerchantable, by reason of the admixture of a foreign substance; or suppose flour sold by sample and on delivery found to be mixed with a white earth, which at once increased the weight and made the bulk unwholesome, or unable to rise in baking, and so unmerchantable; or brandy sold by sample coloured with some new stuff which turned out to be a violent purgative, but the effect of which could not be discovered by tasting in the usual way without swallowing, or which did not act until after the bargain was complete,—what is the law of such cases?

This question may arise in various states of fact, as to many of which the law has been already settled by decided cases, no one of which applies in terms to the present.

The first state of circumstances already dealt with by decision is that of a sale by sample of goods, in which, unknown to the seller and buyer, there was a defect, by reason of a fraudulent act of the producer of the goods done to increase the apparent weight, such defect not being discoverable by the sample, though it afterwards developed heat in the bulk so as to make it unmerchantable. That was the case in *Parkinson* v. *Lee* (1), where there was a sale of hops by sample, which the grower had fraudulently watered in order to increase their weight. This fact was unknown to the seller though the fraud was of a sort known in the trade, and of this both buyer and seller was aware. The sample being taken from the centre of the pocket and exposed to the air did not suffer from the damp, and it would not be discovered in the bulk until it was disclosed by the gradual process of heating. The hops were bought in January, and delivered on the 8th of July. By the end

(1) 2 East, 314.

of July the effects of the heating were apparent in all the pockets; one of them was found to be unsaleable a few days after delivery, and the rest between that time and the 18th of October following. The jury found that the bulk answered in fact to the sample at the time of the sale without fraud, and that the seller had then no knowledge of the latent defect of the commodity. They, however, found for the plaintiff under the direction of the judge, upon the count alleging an implied warranty of merchantableness. That direction, which certainly went a very long way when it is considered that, as the sample was sound and the bulk answered the sample at the time of the sale, the hops must have been good at that time, was overruled by the Court, and a new trial granted upon the ground, that "the buyer had bought the pockets upon samples fairly taken in the usual way, and the seller merely sold what he had before bought upon the same mode of examination." Lawrence, J., in delivering judgment, said (1): "I know of no authority which makes the seller liable for a latent defect where there is no fraud, and no representation was made by him on the subject to induce the buyer to take the thing. In 1 Roll Abr. 90, P. 3, it is said, that if a merchant sell cloth to another, knowing it to be badly fulled, an action on the case in nature of deceit lies against him, because it is a warranty in law. But there is no authority stated to shew that the same rule holds if the commodity sold have a latent defect, not known to the seller." So that in *Parkinson* v. *Lee* (2) (the authority most relied upon for the defendants) the sample was fair, the bulk purchased was ascertained and existing, it did, at the time the bargain was made and the property passed, in fact answer the description in the contract, and was the very thing bargained for, and the secret defect which afterwards developed itself, and made the bulk unmerchantable, was not known to the seller nor caused by any act of his.

Another class of cases is that of goods bought under a specified commercial description, either by sample, or even after inspection of bulk. In such cases it is an implied term, notwithstanding the sample or inspection, that the goods shall reasonably answer the specified description in its commercial sense. The sample in such cases is looked upon as a mere expression of the quality of the

(1) 2 East, at p. 322. (2) 2 East, 314.

1868

MODY v. GRHGSON.

article, not of its essential character, and notwithstanding the bulk be fairly shewn, or agree with the sample, yet if from adulteration or other causes not appearing by the inspection or sample, though not known to the seller, the bulk does not reasonably answer the description in a commercial sense, the seller is liable. Thus in *Nichols* v. *Godts* (1) where the sale was of foreign refined rape-oil, warranted only equal to sample, the jury found that the oil tendered was the same as the sample, but that it was not "foreign refined rape-oil," but a mixture of foreign refined rape-oil and another oil; it was held by the Court of Exchequer that the sample must be considered as referring to quality only, and could not control the contract in respect of the essential character of the article to be delivered. As Pollock, C.B., said: "It is not exactly a warranty; but if a man contracts to buy a thing he ought not to have something else delivered to him." And for like reasons, in *Josling* v. *Kingsford* (2), upon a sale of "oxalic acid, quality approved," after examination of samples and inspection of bulk, the bulk upon trial in use proved inferior, and being chemically tested appeared to have been adulterated with 10 per cent. of sulphate of magnesia, so as that, in the opinion of the jury, it was not what in commercial language might properly be said to come under the denomination of oxalic acid. The seller in that case, although he knew nothing of the adulteration, was held liable by the Court of Common Pleas. These cases were approved of in *Jones* v. *Just* (3) by the Court of Queen's Bench, and they establish beyond question that neither inspection of bulk nor use of sample absolutely exclude an inquiry whether the thing supplied was otherwise in accordance with the contract, and that if the sellers in this case had agreed to deliver merchantable grey shirting according to a sample, not disclosing that it was unmerchantable by reason of the mixture of china clay, they would have been liable.

The question, therefore, is whether the facts of the case shewed that the contract was for merchantable grey shirting; and this must depend upon the fair inference to be drawn from the contract itself, and the circumstances under which it was made, so far as they are relevant to explain it. The goods were not specified, nor ascer-

(1) 10 Ex. 191; 23 L. J. (Ex.) 314. (2) 16 C. B. (N.S.) 447; 32 L. J. (C.P.) 94.
(3) Law Rep. 3 Q. B. 197.

tained, nor inspected. They were bought by a sample which did not disclose any defect. That sample was made by the seller to represent the article, and, as we must assume against the seller, to represent it fairly to the buyer. It did, in fact, represent to the buyer a merchantable article. The article itself was stipulated for in terms "each piece to be of 7 lbs. weight," which, if properly complied with, and no foreign material introduced, would have insured a merchantable article. The superadded stipulation for each piece to weigh 7 lbs. was descriptive of the goods, and asserted their essential character for commercial purposes. Agreement with the sample as to quality would not satisfy this term of the contract. If the pieces delivered had weighed but 6 lbs., though they had agreed with the sample, the contract would have been broken. It was the feigned and colourable performance, not real fulfilment, of the stipulation as to weight, that caused the goods to be unmerchantable. These were the circumstances in which the learned judge ruled that there was a warranty of merchantableness as to matters which could not be judged of from the sample.

For the reasons already given we think that direction was right, upon the ground that the contract, if truly fulfilled, would have given the buyer a merchantable article; and we need not consider whether it might not also be sustained upon the ground that the seller himself made the sample, and must be taken to have warranted that it was one which, so far as his (the seller's) knowledge went, the buyer might safely act upon.

And, indeed, it would be a strange result to hold, as we needs must if the defendants be in the right, that although the contract would have been broken by the seller if he had delivered to the buyer a bale containing 85 per cent. in weight of merchantable grey shirting, together with 15 per cent. of merchantable china clay in a separate form, either in a bag or sprinkled over the grey shirting to make up the contract weight, yet that, by the delivery of a compound of like grey shirting and like china clay, so commingled and incorporated by the seller as to make the whole unmerchantable, the contract is fulfilled.

It was suggested that a judgment for the plaintiffs might hamper commerce. We do not anticipate any such result. A purchaser who buys by sample will still have to use due diligence to avail

1868

MODY v. GREGSON.

himself of all ordinary and usual means to ascertain the properties of that sample, and he will be equally bound by what he actually recognizes in the sample, and by what he might by due diligence in the use of all ordinary and usual means have ascertained. On the other hand, manufacturers (the parties ultimately responsible) introducing a foreign ingredient, in order to give an apparent substance to their fabric, will take care that the cheaper and less proper material is not substituted to an extent which will render the product unmerchantable; unless, indeed, they think it for their interest to announce that they deal in unmerchantable goods.

The direction of Bramwell, B. thus appears to have been right, and the judgment is affirmed.

Judgment affirmed.

Attorneys for plaintiffs: *Uptons, Johnson, & Upton.*

Attorneys for defendants: *Reed, Phelps, & Sidgwick, for Sale & Co., Manchester.*

Dec. 4.

[IN THE EXCHEQUER CHAMBER.]

LEWIS AND ANOTHER *v.* M'KEE.

Shipping—Bill of Lading—Discharge of Consignee from Liability—Special Indorsement—Acquiescence—Acceptance of Contract.

1 QBD 576
1 CPD 620-2, 627, 636
2 CPD 419, 429
10 QBD 181,

The consignee named in a bill of lading being sued for freight, pleaded that he indorsed the bill before arrival of the ship in the words "Deliver to W. & K. or order, looking to them for all freight, dead freight, and demurrage, without recourse to us;" and that the plaintiffs accepted the indorsement, and in pursuance of it delivered the goods to W. & K., and not to the defendant. At the trial it was admitted that the defendant would have been liable to W. & K. for any freight paid by them. There was a conflict of evidence as to whether the indorsement was or was not on the bill when it was shewn to the captain, but the captain swore he did not see it. The learned judge directed the jury that it was immaterial whether the indorsement was or was not on the bill unless the captain saw it, and that the onus lay on the defendant of proving that the captain saw and assented to it. The jury found a verdict for the plaintiffs; and the defendant obtained a rule for a new trial on the ground of misdirection, which was discharged:—

Held (affirming the judgment of the court below), that the defendant having been at the time of the alleged indorsement liable for the freight, and admitting

that he still remained substantially liable, he was bound to prove an assent on the part of the plaintiffs discharging him from that liability, and that assent would not be proved by shewing that the indorsement was on the bill when it was presented to the captain, without proving that the captain in fact assented to it.

ACTION for freight against the consignee named in the bill of lading.

The defendant pleaded, thirdly, that, before the time for delivery, he indorsed the bill of lading, "Deliver to Messrs. Watney & Keene, or order, looking to them for all freight, dead freight, and demurrage, without recourse to us;" and that the plaintiffs accepted the indorsement and delivered the goods in pursuance thereof to Watney & Keene, as the persons entitled to the goods, and not to the defendant. This plea was demurred to, but the demurrer was overruled. (1)

The cause was afterwards tried before Martin, B., at Westminster. The bill of lading, as produced, bore the indorsement stated in the plea, and the defendant and his clerk swore it was there before it was sent to Watney & Keene; but the plaintiffs' captain swore that he never saw it, and that if it had been there when he delivered the cargo he must have seen it; the broker who accompanied him, and who examined the bill, confirmed his evidence; and Keene, the defendant's agent, would not undertake to contradict them. It was admitted that the property in the goods had not passed to Watney & Keene, and that any freight legally due and paid by them would have been chargeable by them against the defendant in account.

The learned Baron directed the jury that the question raised by the third plea was not whether the indorsement was on the bill when the captain saw it, but whether he read and assented to the terms of the indorsement; that it was immaterial whether the indorsement was on the bill or not when it was shewn to the captain, and the onus lay on the defendant of proving that the captain had seen and assented to its terms. On this direction the jury found a verdict for the plaintiffs.

In Michaelmas Term, 1867 (Nov. 8), the defendant obtained a

(1) See the case reported on demurrer, Law Rep. 2 Ex. 37, where the pleadings are set out.

1868

LEWIS v. M'KEE.

rule for a new trial, on the ground of misdirection; and this rule was afterwards (Nov. 23) discharged by Martin and Channell, BB., Pigott, B., dissenting. The defendant appealed.

Dec. 3. *Sir G. Honyman, Q.C.* (*Watkin Williams* with him), for the defendant, contended on the authority of *York, Newcastle, & Berwick Railway Company* v. *Crisp* (1), and *Van Toll* v. *South Eastern Railway Company* (2), that the captain receiving a written document was bound to read it, and if, without objection, he acted upon it, even though he had not read it, he must be taken to have assented to its terms; he was bound either to refuse delivery, or to deliver on the terms proposed.

Butt, Q.C., for the plaintiffs, contended that the defendant's plea would not have been good without the averment that the plaintiffs had accepted the terms of the indorsement; that he was therefore bound to prove this plea in fact, and since it was a plea of exoneration and discharge from an admitted liability, an acceptance must be proved under circumstances shewing a rescission of the contract: *King* v. *Gillett* (3); *Hobson* v. *Cowley* (4); that the case, therefore, differed from those cases where there was no existing contract to be got rid of, but the writing in question itself constituted the contract; here the defendant was already bound to pay freight, whether he accepted the goods or not, and was in no condition to impose terms on the shipowners, nor were any such terms to be anticipated as usual; had the plaintiffs been present, their acceptance could not have been inferred unless they saw and read the alleged indorsement; but the captain had not even power to accept the terms and discharge the defendant: *Grant* v. *Norway* (5); *Shephard* v. *De Bernales* (6); *Dommett* v. *Beckford.* (7)

Sir G. Honyman, Q.C., in reply, referred to *Croft* v. *Lumley* (8), in the Queen's Bench.

Cur. adv. vult.

(1) 23 L. J. (C.P.) 125. 18 Jur 606
(2) 12 C. B. (N.S.) 75; 31 L. J. (C.P.) 241. 8 Jur N.S. 1213
(3) 7 M. & W. 55.
(4) 27 L. J. (Ex.) 205.
(5) 10 C. B. 665.
(6) 13 East, 565.
(7) 5 B. & Ad. 521.
(8) 5 E. & B. 682; 25 L. J. (Q.B.) 73; S. C. in the House of Lords, 6 H. L. C. 672: see at p. 744; 27 L. J. (Q.B.) 321. 2 Jur N.S. 279 4 Jur N.S. 903

1868

LEWIS v. M'KEE.

Dec. 4. The judgment of the Court (Willes, Keating, Hannen, Brett, and Hayes, JJ.) was delivered by

WILLES, J. [After noticing that the bill of lading was not handed over under such circumstances as to pass the contract to Watney & Keene, and that the defendant admitted that he would be liable to repay to Watney & Keene any sum which might be paid by them for freight, and stating that the plea was to be read not as traversing the delivery of the goods, but as a plea of confession and avoidance, admitting a primâ facie case of liability, from which the defendant could not discharge himself without the assent of the plaintiffs, the learned judge proceeded:—] Taking this, therefore, as the issue, and considering that the defendant did not, by his plea, set up that Watney & Keene were in no sense his agents, but admitted that they were his agents in a sense in which delivery to them would be a delivery to himself, so as to make him liable, unless some answer could be furnished to this primâ facie case, it was necessary to see some act on the part of the plaintiffs to absolve him from this liability. Now, inasmuch as the question whether he was so absolved was presented to the jury in a manner sufficiently exhibiting the true contest as presented by the evidence, we think the objection relied on by the defendant cannot be sustained. It ought to be added, that in so deciding we throw no doubt on the principles acted upon in the cases referred to by Sir G. Honyman of *York, Newcastle, & Berwick Railway Company* v. *Crisp* (1), and *Van Toll* v. *South Eastern Railway Company*. (2) In those cases, as part of the contract, and as expressing, or intended to express, the terms on which the parties were dealing, a written document was handed from the one to the other under circumstances in which, without negligence, the person receiving it could not be unaware of what the person delivering it meant to bind himself to. In the first case cited, the document so received was the ticket ordinarily handed to any person from whom the railway company received goods to be carried; in the second case it was the ordinary ticket handed at the cloak room to those who left articles there to be taken care of. And if one person seeks to impose on another a liability by contract, but

(1) 23 L. J. (C.P.) 125.
(2) 12 C. B. (N.S.) 75; 31 L. J. (C.P.) 241.

1868

LEWIS v. M'KEE.

chooses to abstain from reading the terms of the document in which the liability is sought to be expressed, he is in this dilemma. Either he has chosen to accept the terms without taking the trouble of informing himself what they are; or if not reading, he did not assent to the terms proposed, then no action lies, because one side has intended one thing, and the other a different thing, and the transaction is vitiated by mutual error. The first of these alternatives is probably the practical conclusion at which a jury would arrive. But here there is no such dilemma. The shipowners were already entitled to receive freight on delivery of the goods; the contract they relied on was that contained in the bill of lading. The delivery taking place under circumstances in which it would, primâ facie, have bound the defendant, the defendant shews, neither under the statute nor otherwise, a transfer of the liability to Watney & Keene, except by the plaintiffs' assent. But he cannot rely on this; that which would have been proof of it if assented to, not having come to the knowledge of the plaintiffs. If in the ordinary course of business a person were under the obligation of looking at a document before acting on the supposition that it was in order, and that the customary terms were stipulated for, it might be otherwise. But the document here is a bill of lading; and, though a loose suggestion of negligence is thrown out, it is not suggested, nor is there any proof, and in the absence of proof it would be wrong to suppose, that a person procuring a delivery to be made to another of goods, the delivery of which would primâ facie be to himself, he remaining substantially liable, should think it worth while to stipulate that the remedy should technically be not against himself, but against the person to whom the shipowner was to deliver them. These reasons distinguish the case altogether from the class of cases cited, which ought, for the security of contracting parties, to be rigidly adhered to and applied. In the circumstances of the present case we have no doubt our judgment should be in affirmance of the judgment below.

Judgment affirmed.

Attorneys for plaintiffs: *Pritchard & Sons.*
Attorneys for defendant: *Cotterills.*

LLOYD *v.* BURRUP AND ANOTHER. 1868 *Dec.* 8.

Churchwardens—Minister's Stipend—Payment out of Pew Rents—Right to Payment out of Pew Rents paid in advance—Mode of Payment of Stipend— 58 *Geo.* 3, *c.* 45, *s.* 73—59 *Geo.* 3, *c.* 134, *s.* 26—*Right of Action—Trustee and Cestui que Trust—Liability of Churchwardens for Money received by their Predecessors.*

By the 58 Geo. 3, c. 45, s. 73, churchwardens of district churches are appointed, who "shall collect and receive the rents of the seats and pay the stipends or salaries assigned by the Commissioners (under the Act) to be paid to the minister and clerk;" and by the 59 Geo. 3, c. 134, s. 26, the commissioners are empowered to direct the pew rents of any church built under the provisions of 58 Geo. 3, c. 45, or of that act to be assigned to the district and received by the churchwardens in such district, "who shall thereupon be required to pay the stipend which from time to time may be assigned, under the provisions of this act, to the minister or clerk":—

Held, that these enactments constitute not merely the relation of trustees and cestui que trust between the churchwardens and the minister, but also that they impose on the churchwardens the legal and absolute duty of paying over the pew rents applicable to the minister's stipend as soon as they are received, and that the minister has therefore a right of action at law on the statute, or for money received against the churchwardens, in the event of their not performing that duty.

The plaintiff was as the minister of a district church entitled to receive out of pew rents from the defendants, the churchwardens, a stipend of 55*l.* a year under a deed of assignment duly executed by the commissioners, whereby that sum was assigned to the minister of the church, and was ordered to be paid from Christmas, 1826, on the "four most usual feast-days, viz., Michaelmas Day, Christmas Day, Lady Day, and Midsummer Day, in even and equal portions." The deed also provided that the stipend should in no case exceed the amount produced by the pew rents in any one year. At Michaelmas, 1867, two quarters were due, amounting to 27*5l.*, which the plaintiff claimed of the defendants. They had in hand, at the commencement of the action, in October, 1867, only 19*9l.* 10*s.* 10*d.*, of which 12*0l.* 5*s.* 6*d.* was made up wholly of pew rents paid in advance for the occupation of pews after Michaelmas. This sum of 12*0l.* 5*s.* 6*d.* being insufficient to meet the then accruing quarter's stipend, they refused to pay over to the plaintiff:—

Held, that under the terms of the assignment and the circumstances of the case the plaintiff was not entitled to receive from the defendants, in respect of his stipend for the quarters previous to Michaelmas, money paid in advance for the occupation of pews after Michaelmas.

The defendants' predecessors had retained a part of the money received by them for pew rents during their term of office:—

Held, that the plaintiff could not recover from the defendants the amount so retained by their predecessors.

DECLARATION: First count, that under and by virtue of the 58 Geo. 3, c. 45, the 59 Geo. 3, c. 134, and the 3 Geo. 4, c. 72, a

1868

LLOYD v. BURRUP.

church was built at Kennington, a district created and established under and within the meaning of the said acts of parliament, in the parish of St. Mary, Lambeth, in the county of Surrey, and was called the district parish church of St. Mark, Kennington; that the commissioners for executing the said acts, with the consent of the Bishop of Winchester, by an instrument sealed with their common seal duly assigned out of the pew rents of the said parish church, the yearly stipend of 550*l.* to the spiritual person for the time being appointed to serve and serving the said church, and to the clerk for the time being of the said church, such salary as with fees should amount to 40*l.* a year, the said stipend and salary to commence from the 30th June, 1824, and to be paid as after-mentioned; that the commissioners thereby assigned the rents of the pews of and in the said church to the said district of Kennington, and ordered the same to be received by the churchwardens of the district, and that they, the churchwardens, should out of the same pay the aforesaid stipend and salary so thereby assigned to the said spiritual person so being such minister, in the manner following, that is to say: from Christmas Day, 1826, they thereby ordered the said stipend to be paid quarterly on the four most usual feast-days, Michaelmas Day, Christmas Day, Lady Day, and Midsummer Day, by even and equal portions; that the commissioners thereby directed that if the said pew rents should not produce in any one year the clear stipend of 550*l.*, after paying the salary of the clerk, then that the whole residue of the said pew rents should be paid to the said minister, as his stipend for that year, in lieu of the said stipend of 550*l.*; that the plaintiff was on and before the 25th of March, 1867, and has been since, the minister and spiritual person serving the said church, and all things were done, &c., to entitle him to the said stipend; that the defendants were the churchwardens of the said church, and as such had received divers pew rents; that the said pew rents, after making all legal deductions therefrom, amount to a large sum of money whereof a part was applicable to the payment of the plaintiff's said stipend; nevertheless, that although two quarters became due whilst the defendants were churchwardens, and although all things were done, &c., necessary to entitle the plaintiff to have the defendants pay to him the said part of the said moneys so re-

ceived by them as aforesaid, and so applicable to the payment of the plaintiff's said stipend, yet the defendant did not nor would pay the same.

Second count, similar in form to the first, and claiming from the defendants as churchwardens, the amount of certain pew rents received and retained by their predecessors in office, which said pew rents were alleged to be also applicable to the payment of the plaintiff's stipend.

Third count, for money payable, for money received, and due on accounts stated.

3rd plea to the first count, by the defendant Burrup. Except as to 73*l.* 8*s.* 7½*d.* and 5*l.* 16*s.* 8½*d.*, that the said pew rents in the said district parish church, are and always have been payable in advance by the parishioners and other seatholders; that this action was brought to recover the plaintiff's stipend for two successive quarters of years ending at Michaelmas Day, 1867; that all pew rents received by him, the defendant Burrup, for the letting of pews and seats in pews in the said church for the said two successive quarters ending as aforesaid, and for any period prior thereto, after making all deductions and payments therefrom authorized by law, had been applied and paid over to and received by the plaintiff in payment and on account of his said stipend, he being the spiritual person appointed to and serving the said church during the said two quarters of a year; that the only pew rents received by him, the defendant Burrup, which had not been so applied and paid over, were pew rents received in advance for the half year just commenced and not yet expired, commencing at Michaelmas Day then last past and ending at Lady Day, 1868, and that the same were applicable to and held by the defendant as such churchwarden, for the purpose of being applied to and on account of the stipend of the spiritual person who might be appointed to serve and in fact might serve in the said church and become entitled under the assignment of the said commissioners to the stipend for such half year commencing at Michaelmas Day then last past, and ending at Lady Day, 1868, and on account of the salary of the said clerk in the declaration mentioned, and of other lawful expenses that might accrue during the said half-year not yet expired, and which might become deductions and payments out of the said pew rents received

1868

LLOYD v. BURRUP.

in advance for the said half-year, and that the same were not more than sufficient for the several purposes aforesaid.

7th plea. To the third count except as to the same: Never indebted.

9th plea. To the whole declaration, as to the said sum of 73*l.* 8*s.* 7½*d.*: Payment after action.

10th plea. To the same as to the said sum of 5*l.* 16*s.* 8½*d.*: Payment after action.

Issue; and demurrer to the second count of the declaration, and to the third plea, and joinder in demurrer.

The demurrers came on for argument in Easter Term, 1868 (April 27), but after the case had been partly heard, the further argument was postponed until the issues of fact had been disposed of. The cause was tried at the first Middlesex sittings in Trinity Term, 1868, before Pigott, B., when the following facts were proved:

The plaintiff is the perpetual curate, and the defendants in 1867—8 were the churchwardens of St. Mark's, Kennington. The church was erected and consecrated in the year 1824, under the Church Building Acts of 1818, 1819 (58 Geo. 3, c. 45; 59 Geo. 3, c. 134), and by deed dated the 13th of February, 1827, the commissioners appointed by those acts and in pursuance of the powers conferred on them by 58 Geo. 3, c. 45, s. 73, and 59 Geo. 3, c. 134, s. 26 (1), assigned out of the pew rents of the church a yearly stipend of 550*l.* unto the "spiritual person" appointed to serve the same, and a salary of 40*l.* a year to the clerk, such stipend and salary to commence as from the 30th day of June, 1824, the day

(1) The 58 Geo. 3, c. 45, s. 73, enacts that two fit and proper persons are to be appointed as churchwardens, who (amongst other duties) "shall collect and receive the rents of the seats and pews, and pay the stipends or salaries appointed by the commissioners to be paid to the minister and clerk of and belonging to the church for the time being." The 59 Geo. 3, c. 134, s. 26, enacts that "it shall be lawful for the commissioners in any case in which they shall deem it expedient, from time to time to order and direct that the rents of the pews in any church or chapel built . . . . under the provisions of the recited act (58 Geo. 3, c. 45), or this act, shall be assigned to the parish or district, and received by the churchwardens or chapelwardens in such parish or district, who shall thereupon be required to pay the stipend which from time to time may be assigned or fixed under the provisions of this act to the minister or clerk; provided always that the parish shall not in any case be answerable to such minister or clerk, for any greater sum in each year than the amount of the rent of the pews which shall have been actually let during the preceding year in any such church or chapel."

1868

LLOYD v. BURRUP.

of the consecration of the church; and by the same deed they further ordered and directed that the pew rents should be received by the churchwardens, who out of the same were to pay the stipend and salary aforesaid, "in manner following, that is to say from Christmas Day, 1826, quarterly, on the four most usual feast-days, that is to say, Michaelmas Day, Christmas Day, Lady Day, and Midsummer Day, by even and equal portions . . . and if the said pew rents shall not produce in any one year the clear stipend of 550*l.*, after paying the salary of the said clerk, then the whole residue of the said pew rents shall be paid to the said minister as his stipend for that year in lieu of the said stipend of 550*l.*" The plaintiff from the time of his appointment in the year 1864 up to Lady Day, 1867, had received from the churchwardens a stipend at the above rate in each year. At Michaelmas, 1867, two quarters were due, amounting to 275*l.*, which the plaintiff now sought to recover, but, partly from the predecessors in office of the defendants not having paid over the whole of the pew-rents they had received during their term of office, and partly from other causes, the defendants had in hand at the commencement of the action 199*l.* 10*s.* 10*d.*, and no more. Of this they paid the plaintiff after action, 79*l.* 5*s.* 4*d.*, keeping in their hands the balance of 120*l.* 5*s.* 6*d.*, which was made up wholly of pew rents *paid in advance* for the occupation of pews *after* Michaelmas. A verdict was, under these circumstances, entered generally for the defendant Burrup, with leave reserved to move to enter a verdict for the plaintiff.

A rule was accordingly obtained to enter a verdict for the plaintiff on such issues as the Court might direct, on the ground that upon the evidence the plaintiff was entitled to the verdict; and on the ground that the verdict should be entered on the first count for the sum the churchwardens had in hand for pew rents at the time of action brought; and upon the ground that the verdict should be entered for the plaintiff on the second count for the sum of 89*l.* 4*s.* 9*d.*, or 50*l.* 12*s.* 8*d.*, or some other sum. The Court to be at liberty to draw inferences of fact, and to have power to amend; the demurrers to be argued with the rule.

June 10, 1868. *T. Jones, Q.C.*, and *J. Thompson*, shewed cause, and supported the demurrer to the second count of the declaration.

1868

LLOYD v. BURRUP.

This action is not maintainable. The relation of the plaintiff to the defendant is that of cestui que trust and trustee, and no action will lie either on the statute or for money received: *Pardoe* v. *Price* (1); *Edwards* v. *Lowndes* (2); *Bogg* v. *Pearse* (3); *Hopkinson* v. *Puncher*. (4) But assuming that an action may be brought, the plaintiff is not entitled to anything beyond what the defendant had received for pew rents for pews occupied up to Michaelmas, and that has been paid over to him. The effect of the 58 Geo. 3, c. 64, s. 77, and 59 Geo. 3, c. 134, s. 26, and of the terms of the assignment of stipend, is that the year is to be taken to run from Christmas to Christmas, and that the stipend is to be paid in four equal quarterly instalments out of the money paid for pews in each quarter. The rents paid for one quarter must not be applied to the payment of stipend accrued due in the quarter preceding. If there was a change of minister during the year, such a construction might have the effect of entirely depriving the new comer of salary. Moreover, the amount of stipend is to depend on the year's receipts, and these cannot be ascertained until the Christmas in any year. According to s. 26 the stipend, though fixed at 550*l.* as a maximum, is not to exceed the sum "at which the pews have been let during the next *preceding* year." But this term "preceding year" must mean the *current* year; and that it was so understood by the commissioners is clear from the language they use in the deed of assignment. Again, the defendant is, at all events, not liable for money he has never received from his predecessors in office. Possibly they ought to have paid it over to him, but they have not done so; whether rightly or wrongly, is immaterial. On the demurrer to the second count, therefore, the defendant is entitled to judgment.

Prentice, Q.C., and *Longley*, in support of the rule and of the demurrer to the third plea. The action is maintainable, because there is a statutory duty on the defendant to pay over the money received by him to the plaintiff.

[CHANNELL, B. If the stipend is a first charge on the pew rents, I should be inclined to agree with you that the relation of the parties is not, as is suggested, that of trustee and cestui que trust.]

(1) 16 M. & W. 451.
(2) 1 E. & B. 81; 22 L. J. (Q.B.) 104.
(3) 10 C. B. 534; 20 L. J. (C.P.) 99.
(4) 3 Ex. 95; 18 L. J. (Ex.) 6.

It is in effect a first charge: 58 Geo. 3, c. 45, s. 73; 59 Geo. 3, c. 134, s. 26. The defendant is therefore liable either to a special action on the statute or for money received: Com. Dig. Tit. Debt. (A 9); *Tilson* v. *Warwick Gas Light Company* (1); *Cane* v. *Chapman* (2); *Bartlett* v. *Dimond* (3); *Roper* v. *Holland*. (4) And he ought to pay over the whole amount even although he has received no part of it from his predecessors. They are liable to pay what they have wrongfully retained to him: *Astle* v. *Thomas*. (5) There is nothing in the acts or the assignment to apportion each quarter's rents to each quarter's payment. The *mode* of payment is on each quarter-day, and the *measure* of payment the amount received during the *preceding* year, i.e., the year preceding the Christmas with which the current year begins. Now, in this case the rents of 1866 were proved to have exceeded 550*l*., and the minister was therefore entitled to all the pew rents received in 1867 up to that limit, whether paid in advance or not.

Cur. adv. vult.

Dec. 8. The judgment of the Court (Kelly, C.B., Martin, Bramwell, and Channell, BB.) was delivered by

KELLY, C.B. This is an action against the churchwardens of a district church for the minister's stipend payable out of pew rents received by the defendants as churchwardens. One of them, Burrup, alone resists the action.

The first objection is that the defendants are trustees, and the plaintiff a cestui que trust; that no action lies, and a bill in equity is the only remedy. Some cases have been cited in support of this objection, but in all of them the defendants have received moneys applicable to different purposes, and were at liberty to apply them to one or another purpose at their discretion. In the present case, under the provisions of the Church Building Acts (58 Geo. 3, c. 45, and 59 Geo. 3, c. 134), and the order of the church commissioners assigning the pew rents to the district, and expressly directing them to be received by the churchwardens, and that out of such rents they are to pay the stipend, the rents are, in the first instance, expressly made applicable to the payment of the stipend, subject

(1) 4 B. & C. 962.
(2) 5 A. & E. 647.
(3) 14 M. & W. 49.
(4) 3 A. & E. 99.
(5) 2 B. & C. 271.

1868

LLOYD v. BURRUP.

only to the payment, after certain deductions, of the salary of the clerk, upon which no question arises. The plaintiff, upon these provisions of the act, contends that whenever the churchwardens have received pew rents applicable to the payment of his stipend, and the stipend has become due, a special action upon the statute, or an action for money had and received, is maintainable by him against the churchwardens to recover the amount, and to this extent we are of opinion that the plaintiff's claim is sustainable.

But the plaintiff likewise insists that he is entitled not only to pew rents received in respect of quarters expired, and for which the stipend has become due, but for such as have been paid in advance, and for periods yet to come, and in respect of which no stipend has yet become payable, and this claim, we think, cannot be sustained.

By the 73rd section of the Act of 1818 churchwardens are to be appointed, "who shall collect and receive the rents of the seats, and pay the stipends or salaries appointed by the commissioners to be paid to the minister and clerk." Then by the Act of 1819, s. 26, the commissioners are authorized to direct "that the rents of the pews shall be assigned to the parish or district, and received by the churchwardens, who shall therefrom be required to pay the stipend which from time to time may be assigned to the minister and clerk." These provisions are unconditional and precise, and their effect is to impose upon the churchwardens the legal duty of paying over the pew rents applicable to the stipend to the minister as soon as they are received. But the third plea, which alleges in effect that the defendant has paid to the plaintiff or into court all that the churchwardens have received down to the 15th of October, the day when the action was brought, except certain sums for pew rents, to commence from Michaelmas, 1867, and to which plea the plaintiff has demurred, directly raises the question, whether the plaintiff is likewise entitled to the pew rents received in advance? It appears by the 73rd section of the Act of 1818, and the 26th section of the Act of 1819, above referred to, together with the assignment of the stipend of the date of February, 1827, that the amount of the stipend assigned to the minister, and to be paid to him by the churchwardens, is 55*l.* a year, and, after the payment of certain arrears long since paid, this stipend is to be paid at the four most usual quarter-days, beginning Christmas, 1826. This

1868

LLOYD v. BURRUP.

stipend appears to have been regularly paid, and the amount of pew rents received to have been sufficient for the purpose, until Michaelmas, 1867, when the two quarters' stipend, amounting to 275*l.*, became due, and is the sum sought to be recovered in this action. From some causes or other not fully disclosed, but partly from the late churchwardens not having paid over the whole of the pew rents they had received, the present churchwardens had 199*l.* 10*s.* 10*d.*, and no more, in their hands on the 15th of October, 1867, when the action was brought. Of this, before and after action brought, 73*l.* 8*s.* 7½*d.* and 5*l.* 16*s.* 8½*d.* appears to have been paid to the plaintiff or into court, leaving a balance of 120*l.* 5*s.* 6*d.* to be accounted for, and this sum is alleged by the defendant in the third plea, and is proved, to consist wholly of pew rents payable and paid in advance, and for the use and occupation of pews from and after Michaelmas, 1867.

The question therefore is, whether this sum can be applicable to the stipend becoming due before and at that date. By the 26th section, before mentioned, it is provided that the minister's stipend in any one year (that is, from Christmas to Christmas) shall not exceed the sum for which the pews shall have been let in the next preceding year. As, however, it is not suggested that the rents from Christmas, 1865, to Christmas, 1866, fall short of 550*l.*, no question arises upon this provision of the statute, and it is referred to only because doubts were expressed as to its meaning on both sides at the bar. But it appears by the terms of the assignment of the stipend of 1827 that the stipend, although fixed at 550*l.* a year, is not to exceed the sum actually produced by the pew rents in each particular current year. It cannot therefore be known until Christmas what shall be the amount of the stipend in any one current year; and as in the year in question, Christmas, 1866, to Christmas, 1867, there was evidently some deficiency, from whatever causes it may have arisen, in the sums received by the expiration of the Michaelmas quarter, it could not be known until the ensuing Christmas whether the deficiency would be made up, and consequently whether the entire stipend of 550*l.*, or how much less, would ultimately become payable. Under these circumstances the churchwardens having paid over to the minister the whole of the money in their hands accrued due in respect of the first three

1868

LLOYD v. BURRUP.

quarters of the year, and having no more left in their hands than 120*l.* 5*s.* 6*d.*, a sum insufficient to provide for the quarter from Michaelmas to Christmas, and consequently to leave any surplus applicable to such deficiency, it is clear that the plaintiff was not entitled to claim any portion of that sum in respect of the expired quarters, inasmuch as if no more should be produced between the time when the action was brought and Christmas, 1867, that sum would be altogether applicable to that quarter, and could not be lawfully applied to either of the two preceding quarters in respect of which the action was brought. The defendant therefore is entitled to the judgment of the Court upon the demurrer to the third plea.

The plaintiff likewise claims, by the second count, a balance of pew rents received, and in the hands of the late and not paid over to the present churchwardens, but retained to meet certain sums paid, or alleged to be payable, for expenses incurred in respect of the church. We are, however, of opinion that this demand cannot be sustained, and that there is no ground upon which we can hold the defendant liable for moneys received, and not paid over, by the late churchwardens; but we must not be supposed to sanction the retention or application of the pew rents by the late churchwardens to any of these expenses, which appear to be otherwise provided for by the acts of parliament.

Rule discharged, and judgment entered for the defendant on the demurrer to the second count of the declaration, and on the demurrer to the third plea.

Attorney for plaintiff: *W. C. Hall.*
Attorney for defendant Burrup: *John Fraser.*

THE SOUTHAMPTON STEAM COLLIERY COMPANY *v.* CLARKE. 1868 Dec. 8

Charterparty—Full and Complete Cargo—Freight—"Baltic" printed rates—Cargo of "Oats or other lawful merchandise."

By a charterparty the defendant, the charterer, undertook to load at Archangel "a full and complete cargo of oats or other lawful merchandise," and the plaintiffs, the shipowners, to deliver the same on being paid freight as follows:—"4*s.* 6*d.* sterling per 320 lbs. weight delivered, for oats, and if any other cargo be shipped, in full and fair proportion thereto, according to the London Baltic printed rates."

The defendant put on board at Archangel a full and complete cargo of flax, tow, and codilla, being three of the articles mentioned in the Baltic printed rates, and paid to the plaintiffs the freight earned by the goods thus shipped, according to a scale derived from the tables which constitute the Baltic rates. The plaintiffs claimed in addition the difference between this amount and the larger amount which would have been earned by a full and complete cargo of oats:—

Held, that flax, tow, and codilla being "lawful merchandise" within the meaning of the charterparty, the defendant had fulfilled his contract by loading a full and complete cargo of those articles, and therefore was not, on the true construction of the charterparty, liable for the additional freight claimed by the plaintiffs as upon a full cargo of oats.

Affd in Ex Ch 18 Ex 53.

DECLARATION: First count, for money payable for freight, demurrage, money paid, and money due on accounts stated.

Second count, that it was by charterparty agreed between the plaintiffs and the defendant that the plaintiffs' ship *Winchester* should sail to Archangel, and the defendant should there load her with a full and complete cargo of oats or other lawful merchandise which she should carry to London (or a good and safe port within the limits mentioned in the charterparty) and there deliver on payment of freight at a rate in the said charterparty mentioned, and all things were done, &c., yet the defendant made default in loading such cargo, whereby the plaintiffs were deprived of such freight as would otherwise have been payable to them under the said charterparty.

Pleas: 1. To the first count, except as to 65*l.* 16*s.* 5*d.*, never indebted. 2. To the same, except as to the same, payment. 3. To the same, except as to the same, a set-off for money paid and due on accounts stated. 4. As to 65*l.* 16*s.* 5*d.*, payment into court. 5. To the second count, that the defendant did load a full and complete cargo of lawful merchandise. 6. To the same, that the

1868

SOUTHAMPTON STEAM COLLIERY CO. v. CLARKE.

defendant was ready and willing to have loaded a full and complete cargo of lawful merchandise on board the said ship at Archangel, and that he did load all such cargo on board the same as the plaintiffs were then ready and willing to take on board, and that the plaintiffs received and accepted the said cargo so loaded by the defendant on board the said ship as and for a full and complete cargo of lawful merchandise, and exonerated and discharged the defendant from loading any further cargo therein.

Replication, joining issue on all the pleas, except the 4th, and as to that plea, accepting the money paid into court under it.

By a charterparty dated the 28th of June, 1867, it was mutually agreed between the plaintiffs (the owners of the ship *Winchester*) and the defendant, a merchant of London, as follows,—(among other things), that the said ship should proceed to Archangel and there load from the defendant's factors "a full and complete cargo of oats or other lawful merchandise," and being so loaded should proceed to London or some other good and safe port [specified in the charterparty] and deliver the same on being paid freight, as follows:—"4*s.* 6*d.* sterling per 320 lbs. English weight delivered, for oats, and if any other cargo be shipped, to pay in full and fair proportion thereto according to the London Baltic printed rates, taking as basis for natural weight of the oats 36 lbs. English per bushel." The ship proceeded to Archangel and there was loaded with a full and complete cargo, consisting of 134 tons of tow, 4 tons of codilla, and 30 tons of flax. Codilla and tow are substantially the same article, both being the refuse combings of hemp or flax, but the one being prepared for sale in a somewhat different manner from the other; and flax and codilla are both mentioned in the London Baltic printed rates. This species of merchandise being of a very light weight, 120 tons of ballast were required in order to enable the ship to sail safely on her homeward voyage. She would have held 4600 qrs. of oats. According to the Baltic printed rates referred to in the charterparty, 97 qrs. of wheat are equal to 10 tons of clean hemp; oats are to pay 22½ per cent. less than the freight of wheat; flax is to pay the same as hemp; and tow or codilla one half more than the freight of hemp. Taking the flax, codilla, and tow, upon the proportions to oats to be derived from these figures, and the oats at 4*s.* 6*d.* per

1868

SOUTHAMPTON STEAM COLLIERY CO. v. CLARKE.

320 lbs., as per charterparty, the freight earned by the cargo actually shipped was 76*l.* 19*s.* 10*d.* for flax; 14*l.* 0*s.* 9*d.* for codilla; and 510*l.* 19*s.* 11*d.* for tow; making altogether 602*l.* 0*s.* 6*d.* The difference between this sum and that paid into court was paid by the defendant to the plaintiffs before action.

At the trial before Kelly, C.B., at the London sittings after Trinity Term, 1868, the above facts having been proved, the plaintiffs insisted that under the charterparty they were entitled to the freight which would have been earned, if a full and complete cargo of 4600 qrs. of oats had been shipped, i.e., to the sum of 1035*l.*, taking oats at 4*s.* 6*d.* per quarter. The defendant, on the other hand, contended that he had loaded a full and complete cargo of "other merchandise" within the meaning of the charterparty and the printed rates, and was not bound to pay on the principle suggested. The jury negatived the existence of any usage or practice in the Baltic trade to allow and pay dead freight on flax, tow, or codilla, or ballast, in addition to the freight payable by the Baltic printed tables; and the learned judge thereupon directed a verdict to be entered for the defendant, being of opinion that on the true construction of the charterparty the plaintiffs were not entitled to more freight than they had received. Leave was reserved to move to enter a verdict for the plaintiffs for 435*l.* 3*s.* 1*d.*, or such other sum as the Court might direct.

A rule was obtained accordingly, or for a new trial, on the ground that on the true construction of the charterparty, and having regard to the London Baltic printed rates of freight, and the facts of the case, the plaintiffs were entitled to recover a sum of money exceeding the sum paid into court, either because they were entitled to be paid at the same rate as if a cargo of oats had been loaded, or as if a full cargo of merchandise of the same kind as oats had been loaded, or because the cargo loaded was not a full and complete cargo of lawful merchandise within the meaning of the charterparty.

Nov. 13. *Field, Q.C.*, and *Gadsden*, shewed cause. The defendant loaded "lawful merchandise" within the meaning of the charterparty and the Baltic printed rates, and moreover shipped a complete cargo of the particular sort of articles he selected and

1868

SOUTHAMPTON STEAM COLLIERY CO. v. CLARKE.

had a right to select. This being so, in the absence of any usage to the contrary, he is only liable for freight, to be calculated in the mode indicated by the charterparty and the tables, on the goods actually carried. The cases of *Capper* v. *Forster* (1) and *Warren* v. *Peabody* (2) differ from this case, because in them the defendant had broken his contract by shipping a cargo not contemplated by the charterparties. But here the contract has been performed.

Manisty, *Q.C.*, and *Cohen*, in support of the rule. The contract has not really been fulfilled, for the charterparty contemplated the shipment of a cargo which should fill the vessel; i.e., oats, or some lawful merchandise like oats. But the defendant loaded a cargo of such a description as to require 120 tons of ballast. He ought to have filled up the ship with oats or some goods ejusdem generis, and, not having done so, ought to pay as if the whole cargo had been oats. The defendant cannot otherwise be said to have paid "in full and fair proportion" to oats. *Capper* v. *Forster* (1) shews that the charterer has no right to choose a cargo which requires a quantity of ballast to make it safe, and then to pay nothing for the space not filled with merchandise. Again, if not entitled to payment as on a full cargo of oats, the plaintiffs are at all events entitled to be paid on as much tow or flax as would have occupied the same space.

[KELLY, C.B. It is not open to you to suggest such a mode of measurement and payment now. The point was not made at the trial, and no evidence of the relative space occupied by oats and flax or tow was given. The Court, therefore, have no materials on which to calculate the amount which would be due to the plaintiffs upon this construction of the payment clause in the charterparty.]

Cur. adv. vult.

Dec. 8. The judgment of the Court (Kelly, C.B., Channell, Pigott, and Cleasby, BB.), was delivered by

KELLY, C.B. In this case the plaintiffs sue for freight claimed to have been earned by the ship *Winchester*, chartered by the

(1) 3 Bing. N. C. 938. (2) 8 C. B. 800.

1863

SOUTHAMPTON STEAM COLLIERY CO. v. CLARKE.

defendant upon a voyage from Archangel to London, or any port on the east of Britain.

By the terms of the charterparty, as far as they are material in this cause, the defendant the charterer undertook to load on the ship *Winchester* "at Archangel a complete cargo of oats, or other lawful merchandise, the ship to deliver the same on being paid freight as follows: 4*s.* 6*d.* sterling per 320 lbs. weight delivered for oats, and if any other cargo be shipped, to pay in full the fair proportion thereto, according to the London Baltic printed rates, taking as a basis for the natural weight of the oats, 36 lbs. English per bushel."

The defendant put a complete cargo on board at Archangel, of flax, tow, and codilla, being three of the articles mentioned in the printed book of tables or London Baltic printed rates referred to in the charterparty. By one of these tables it appears under the head "grain," that of "wheat, 97 imperial quarters is equal to 10 tons of clean hemp;" that "oats are to pay 22½ per cent. less than the freight of wheat;" and that flax is in all cases the same freight as hemp; and, further, that codilla is to pay one half more than the freight of hemp, and tow the same as codilla. The cargo consisted of 30 tons of flax, 4 tons of codilla, and 134 tons of tow.

Taking the thirty tons of flax upon the proportions to the oats stated in the tables, and the oats at 4*s.* 6*d.* per 320 lbs. the freight earned by the thirty tons of flax would amount to 76*l.* 19*s.* 10*d.*; by the four tons of codilla, to 14*l.* 0*s.* 9*d.*, and by the tow to 510*l.* 19*s.* 11*d.*, making together, within a fraction, 602*l.*, which sum had been paid by the defendant to the plaintiffs, either before action brought, or into court.

The plaintiffs, however, claimed the sum which would have been earned by a complete cargo of oats, and which at 4*s.* 6*d.* per 320 lbs. would amount to 1035*l.* And this action is brought for the difference between these two sums.

I offered to leave any question to the jury that either party might desire. I reserved to either party all points that could be raised upon these facts and documents, and inasmuch as it was insisted on the one side and denied on the other, that the plaintiffs under these circumstances were entitled to this difference as dead freight, or in lieu of dead freight, I left the question to the jury

1868

SOUTHAMPTON STEAM COLLIERY CO. v. CLARKE.

whether there was any usage or practice in the trade between Archangel and this country to allow and pay dead freight upon any of these articles, flax, or tow, or codilla, or ballast, in addition to the freight payable by the Baltic tables; and the jury found in the negative.

A motion has now been made to enter the verdict for the plaintiffs for the difference between 602*l.* and 1035*l.* The plaintiffs also claim a new trial, or that the Court being at liberty to draw inferences from the facts should direct an inquiry as to what additional sum would have been payable for freight, if the space or area which would have been filled with a full cargo of oats had been filled with proportionate quantities, or altogether with flax, tow, and codilla, and should direct the verdict to be entered for this sum.

We are all of opinion that this latter claim not having been made at the trial, and there being no evidence whatever upon which this sum could have been ascertained by the jury, or can now be ascertained by the Court, the verdict cannot upon this ground be disturbed.

With respect to the claim for freight, as upon a full cargo of oats, we are of opinion that upon this point also that the verdict was right, and that the plaintiffs are not entitled to recover. The contract is that the charterers may load a cargo of oats or other lawful merchandise. He has adopted the latter alternative, and put on board a cargo of other merchandise. A question has been raised as to what descriptions of merchandise are included in these words. We are of opinion that they must of necessity mean only those descriptions of merchandise which are specified in the London and Baltic tables as bearing certain proportions to oats, for upon any other construction of the charterparty there would be no means whatever of determining the amount of freight payable for any other description of merchandise than oats. Then, as to the amount of freight payable, we find that it is to be 4*s.* 6*d.* for every 320 lbs. of oats; and that if any other cargo is shipped, the freight is to be in full and fair proportion thereto according to the rates in the tables. The proportion in weights of flax to oats, as appears in the tables, is as above mentioned, and would make the quantity of flax shipped to amount to the above sum of 76*l.* 19*s.* 10*d.*,

1868

SOUTHAMPTON STEAM COLLIERY CO. v. CLARKE.

and so in like manner the codilla to 14*l.* 0*s.* 9*d.*, and the tow to 510*l.* 19*s.* 11*d.* And we are therefore of opinion that upon the true construction of the charterparty the plaintiffs are entitled to these sums, and to no more. The further question might arise whether this result would be modified by the clause that the basis for the natural weight of oats was to be taken at 36 lbs. English per bushel, but no evidence was given at the trial as to this clause being applicable, or how it could, under any circumstances, be applicable to the present case. Nor was any suggestion made with that view in the arguments of the learned counsel for the plaintiffs. It comes into operation in the process of ascertaining the proportion of hemp and flax to wheat and oats, hemp and flax being measured by tons, and wheat and oats by imperial quarters, each quarter containing eight bushels, which must therefore be interpreted to signify eight times thirty-six, or 288 lbs. In this way, and not otherwise, this clause appears upon the evidence to be available in the present case.

The cases of *Capper* v. *Forster* (1) and *Warren* v. *Peabody* (2) have been cited, but these cases only shew that where a ship has been partly loaded with articles not specified as part of the cargo by the charterparty, whereby it is clear that a breach of contract has been committed, the shipowner is entitled to recover the freight which would have been earned if the cargo had consisted of articles within the terms of the charterparty. Here the cargo is strictly within the language of the charterparty, and the only question is, how the freight is to be calculated with reference to the provisions in the charterparty before set forth, and to the Baltic tables. We are therefore, on the whole, of opinion that the defendant has paid all that he was bound to pay under his contract, that the plaintiffs cannot maintain this action, and that the rule should be discharged.

Rule discharged.

Attorneys for plaintiffs: *Westall & Roberts.*
Attorney for defendant: *J. Cooper.*

(1) 3 Bing. N. C. 938. (2) 8 C. B. 800.

END OF MICHAELMAS TERM, 1868.

CASES

DETERMINED BY THE

COURT OF EXCHEQUER

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

HILARY TERM, XXXII VICTORIA.

1869
Jan. 13.

HARDING *v.* INSKIP.

Deed under Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134)—*Process not available under s.* 198—*Staying Proceedings—Application quia timet.*

4 Q B. 274

The defendant, being sued by a creditor, before trial but not in time to plead it to the action, registered a deed under the Bankruptcy Act, 1861. The plaintiff recovered judgment; and, without obtaining leave from the court of bankruptcy, issued execution; but before it had been enforced the defendant applied to this Court to stay proceedings. The Court refused to interfere, although it appeared that the writ was about to be immediately executed.

MOTION for a rule to stay proceedings or to set aside a writ of execution, under the following circumstances:—The defendant, shortly before trial and not in time to plead it to the action (see *Braun* v. *Weller*) (1), executed and duly registered a deed under the Bankruptcy Act, 1861, s. 192, containing a release from his creditors. Judgment having been recovered, the plaintiff, without obtaining leave from the court of bankruptcy, issued execution, but the writ remained, by the consent of the parties, unexecuted in the hands of the sheriff in order to allow of this application being made.

(1) Law Rep. 2 Ex. 183.

1869

HARDING v. INSKIP.

F. M. White, in support of the motion, contended that, as s. 198 prohibited process from being available, and as it was clear that the writ was about to be immediately executed contrary to the statute, the Court would interfere to prevent its process from being abused.

[PIGOTT, B. Is not the jurisdiction as to allowing process to be made available given by the statute to the court of bankruptcy?]

But until leave is given execution is forbidden.

[CHANNELL, B. This is an application quia timet: is there any authority for such a proceeding?]

On the following day *White* mentioned the case of *Sadler* v. *Cleaver* (1), decided under the statute of 6 Geo. 4, c. 16, s. 126.

THE COURT (Kelly, C.B., Channell, Pigott, and Cleasby, BB.) held that the question whether execution ought or ought not to issue was expressly referred by the statute to the court of bankruptcy, and that they could only interfere if it appeared that execution had actually been put in force contrary to the terms of the act.

Rule refused.

Attorney for applicant: *Beetham Batchelor.*

MAXTED *v.* PAINE.

Jan. 18.

Principal and Agent—Usage of Stock Exchange—Shares—Jobber's Liability—Name of Ultimate Purchaser—Carrying over without Ultimate Purchaser's Authority—Contract to indemnify against Calls.

The plaintiff, on the 24th of May, 1866, through his brokers, sold to the defendant, a jobber on the London Stock Exchange, for the account of the 30th, thirty shares in a company which had stopped payment on the 10th of the same month and closed its transfer books on the 12th. On the 29th, the "name day," the defendant gave to the plaintiff's brokers the name of M. (which he had received from another jobber) as the ultimate purchaser and nominee of the shares. M. had sanctioned the passing of his name for the account of the 15th of May, provided a legal transfer of the shares could be effected; but the shares had been carried over from the 15th to the 30th without his authority; and on the 29th he was in fact,

(1) 7 Bing. 769. The application to stay proceedings was there made before judgment. Section 126 is cited as s. 120.

1869

MAXTED v. PAINE.

though not to the knowledge of the defendant, no longer a person who had agreed or was bound to purchase shares in the company. The plaintiff had bought the shares resold by him to the defendant from S. the registered holder, but no formal transfer to the plaintiff had been executed. He was, however, under a contract to indemnify S. against any future calls. On the 8th of June a transfer of thirty shares duly executed by S. was tendered to M., but declined by him. Two calls having afterwards been made on the shares sold, the plaintiff, after unsuccessfully applying to M. to pay them, was compelled under his contract with S. to pay them himself, and he now sought to recover the amount so paid from the defendant :—

Held, that inasmuch as M. had never authorized the carrying over of the shares, and on the 29th of May, the "name day," had ceased to be a person bound to purchase them, the defendant had not, by passing M.'s name as ultimate purchaser and nominee, relieved himself from liability.

SPECIAL case.

The plaintiff, on the 24th of May, 1866, instructed his brokers to sell for him on the London Stock Exchange 100 shares (15*l.* paid) in Overend, Gurney, & Co., Limited. That company had stopped payment on the 10th of the same month, and on the 12th their transfer books were closed. The brokers sold the shares to the defendant, a stock-jobber, on the same day at 17 discount for the account of the 30th of May, and on that day accordingly gave the defendant credit in account current for 200*l.*, being the amount of 2*l.* per share on the 100 shares, so that in fact, as not unfrequently happens in the case of dealings in insolvent companies, the buyer was paid to take the shares. The defendant had, on the 11th of May, sold thirty shares in the same company to another jobber named Witten, for the same account day. On the day before the account day, which is called on the Stock Exchange the "name day," Witten gave the defendant the name of one Maxwell, as the nominee and ultimate purchaser of the thirty shares, and the defendant passed it, on the same day, to the plaintiff's brokers as the nominee and ultimate purchaser of thirty of the 100 shares bought from them on the 24th.

The name of one Punchard had originally been given by a stock-broker named North to Witten, as the ultimate purchaser of eighty shares in the company. But on the 12th of May, Maxwell had entered into an agreement with Punchard to allow his name to be passed as ultimate purchaser for the account of May 15th; and he received 1500*l.* from Punchard to enable him to pay for those shares. At the same time, however, Maxwell stated that he would only

1869

MAXTED v. PAINE.

accept and pay for the shares if the dealers could deliver a legal transfer of them. On the 25th of May, the ten days allowed by the rules of the Stock Exchange for the tender of the shares having expired, Maxwell returned the money to Punchard. Meanwhile Maxwell's name had, on May 14th, been handed to Witten by North as nominee and purchaser, but Witten was not informed of the qualified character of Maxwell's undertaking. The shares were subsequently carried over to the 30th of May, by North's instructions, without authority from either Punchard or Maxwell.

On the 8th of June North took to Maxwell a transfer of thirty shares which he had received from Witten, who had received it from the plaintiff's brokers. The plaintiff was not himself the registered holder of the shares, but they stood in the name of George Perceval Smith, from whom the plaintiff had bought them and who, in order to save the expense of a double transfer, had agreed with the plaintiff to transfer them direct to the purchaser, upon receiving from the plaintiff an indemnity against all calls which might be made by the company or the liquidator in respect of the shares.

When the transfer was tendered to Maxwell it had been duly executed by Smith, but Maxwell refused to accept it from North on the ground that no legal transfer could be made. The circumstances of the transactions between Witten, Maxwell, North and Punchard were not known either to the plaintiff or the defendant.

Two calls of 10*l.* a share each were made in respect of the thirty shares on the 31st of August, 1866, and the 10th of April, 1867, respectively. Maxwell declined to pay them, and the plaintiff was afterwards compelled to do so. The question for the Court (who had power to draw inferences of fact) was, whether under the above circumstances, the plaintiff was entitled to recover from the defendant the sum paid by the plaintiff in respect of the calls. If the Court should be of opinion in the affirmative, judgment to be entered for the plaintiff for 600*l.*; if in the negative, judgment for the defendant.

[It was agreed that the evidence given before the arbitrator in *Grissell* v. *Bristowe*, as to the usage of the Stock Exchange, should form part of the case.] (1)

(1) The evidence is set forth at length in *Grissell* v. *Bristowe*, Law Rep. 3 C. P. at p. 118.

1869

MAXTED v. PAINE.

C. Pollock, Q.C. (*Herschell* with him), for the plaintiff. The defendant by giving Maxwell's name under the circumstances did not free himself from liability. In order to bring himself within the principle of the decisions in *Grissell* v. *Bristowe* (1) and *Coles* v. *Bristowe* (2), the jobber must give the name of some bonâ fide purchaser, who is ready to take the shares.

[CHANNELL, B. You contend that it is not enough to give the name of a person otherwise unobjectionable, but that the name of some one to whom no reasonable objection can be taken, and who had *agreed to buy*, must be given?]

That is so. But here Maxwell never agreed to buy absolutely but only in a particular event, viz. if the dealers could deliver a legal transfer. Moreover, his contract was in fact limited to the account of the 15th of May. On the 25th he returned the money he had received to Punchard, and the shares were carried over without his sanction or knowledge. In other words, on the 29th of May his name was not that of a "purchaser" in any sense. He ceased to fill that character on the 25th, if indeed he had ever filled it. The cases referred to decide no more than that the jobber is relieved when the name he gives is that of an unobjectionable purchaser who has agreed, and, when his name is given, is still willing to buy. They do not decide that the mere giving of a name for the shares will terminate the jobber's responsibility. Lord Cairns, in delivering judgment in *Coles* v. *Bristowe* (3), expressly repudiates such a construction of the usage of the Stock Exchange. A contract of that kind, he says, "would be highly unreasonable if not illusory;" and again, "The contract of the jobber is that at the settling day he will either take the shares himself, in which case he would, of course, be bound to accept and register a transfer and to indemnify, or he will give the name of one or more transferees, names to which no reasonable objection can be made, who will accept and pay for the shares." It cannot be said that Maxwell's was such a name.

Mellish, Q.C. (*Beresford* with him), in support of the rule. The plaintiff was not the registered holder of these shares. The calls were not made upon him. But he chose to enter into a special

(1) Law Rep. 3 C. P. 112; S. C. in Ex. Ch.; Law Rep. 4 C. P. 36.

(2) Law Rep. 4 Ch. 3.

(3) Law Rep. 4 Ch. at pp. 10, 11.

contract with Smith, the holder and vendor to him, to indemnify him against calls. The defendant cannot be liable to recoup the plaintiff the damages arising from a breach of this special contract which possibly may not have been made on the Stock Exchange or subject to its rules. The plaintiff, not being the registered holder, could not have delivered a transfer of these shares to the defendant.

[CLEASBY, B. The sale was not of specific shares.]

Assuming his position under his contract to be the same as that of the holder, still the defendant who knew nothing about the arrangement limiting Maxwell's undertaking, has brought himself within the protection of the usage as construed in *Grissell* v. *Bristowe* (1) and *Coles* v. *Bristowe.* (2) Maxwell's name was not objected to as it might have been within the ten days allowed for tendering the shares. Neither Smith nor the plaintiff made any inquiry; and the transfer having been executed under those circumstances, they cannot now complain that the name was not that of a purchaser. Again, the carrying over of the shares is stated to have been without Maxwell's authority; but he did not object to accept the transfer on that ground, but only on the ground that no legal transfer could be effected. The fair inference is that he acquiesced in the shares being carried over, and was still a purchaser who had agreed and was bound to buy on the 29th of May.

[THE COURT intimated that they desired to hear a reply only on the question of the plaintiff's contract with the registered holder.]

C. Pollock, Q.C., in reply. The question submitted to the Court is simply whether the defendant is bound to pay the plaintiff 600*l.*, being the amount of the two calls; and the contract between Smith and the plaintiff is wholly immaterial. Smith had sold to the plaintiff, who was therefore the party actually liable to calls under his indemnity: but, in order to save expense, no actual transfer was made. This being so, Smith's name necessarily remained on the company's books in accordance with the 11th article of association; but that circumstance does not affect the contract between the plaintiff and the defendant, whereby the latter bound himself

(1) Law Rep. 4 C. P. 36. (2) Law Rep. 4 Ch. 3.

1869

MAXTED v. PAINE.

either to take the shares himself or to give the name of some unobjectionable person who would.

CHANNELL, B. I am of opinion that the plaintiff is entitled to our judgment. When the terms of the question put to the Court are looked at, it does not appear that any doubt or difficulty can arise as to the amount of damages to be recovered. The sole point for our consideration is the more important one whether Maxwell was, under the circumstances stated, a "purchaser" on the 29th of May in such a sense as that the giving of his name on that day exonerated the defendant from liability. Now, this Court is of course bound by the decisions of the Court of Exchequer Chamber in *Grissell* v. *Bristowe* (1), and of the Lord Chancellor and Lord Justices in *Coles* v. *Bristowe* (2), nor is it my intention to say one word to prevent the due application of the principles of these decisions. But neither of them governs the present case. The person whose name was given here on the 29th of May was not from and after the 25th, when he returned the money he had received to Punchard, under any agreement to buy. On the latter day his agreement to buy or to allow his name to be passed came to an end, and moreover the carrying over the shares from the 15th to the 30th of May was without his knowledge or consent. This case, therefore, is in my judgment distinguishable from the two I have referred to, and I do not think the defendant by passing Maxwell's name on the 29th of May brought himself within the protection of the rules of the Stock Exchange as construed by the judges in those cases.

PIGOTT, B. I am of the same opinion; and I base my judgment shortly on the ground stated in the case, viz., that "the shares were upon the instructions of North carried over to the 30th of May, he, North, not having any authority from Punchard or Maxwell to give such instructions." This being so, Maxwell was not, at the day his name was passed, a buyer bound to take the shares, and therefore not a person the giving of whose name freed the jobber from liability.

CLEASBY, B. I am of the same opinion. The only question for

(1) Law Rep. 4 C. P. 36. (2) Law Rep. 4 Ch. 3.

1869

MAXTED v. PAINE.

the Court in this case is whether the contract has been performed, and there is none before us as to the amount of damage recoverable. Now I am clearly of opinion that the contract has not been performed. It was not until the 8th of June that the transfer was handed over to Maxwell for execution; and he was in my judgment entitled to decline to execute it, the shares having been carried over from the 15th to the 30th of May without his sanction or authority. When his name was passed he had ceased to be a person who could be called upon to take the shares. I think on that ground the defendant still remained liable to the plaintiff, for whom accordingly our judgment must be given.

Judgment for the plaintiff.

Attorneys for plaintiff: *Freshfields.*
Attorney for defendant: *Pontifex.*

DICKSON *v.* THE NEATH AND BRECON RAILWAY COMPANY.

Jan. 21.

Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *s.* 60—*Oral Examination of Judgment Debtor—Body Corporate—Power to Examine Directors.*

The Common Law Procedure Act, 1854, s. 60, enacts that it shall be lawful for any creditor who has obtained a judgment in any of the superior courts to apply to the Court or a judge for a rule or order that the judgment debtor should be orally examined as to any and what debts are owing to him:—

Held (per Kelly, C.B., Pigott and Cleasby, BB., Channell, B., doubting), that in an action in which a corporation were defendants there was no power under this section to order the oral examination of the directors of that corporation.

RULE calling on three directors of the Neath and Brecon Railway Company, and the secretary, to shew cause why they or some or one of them should not be orally examined before a master of the court, under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 60, as to any and what debts were owing to the company.

The plaintiff was a judgment creditor of the defendants, an incorporated company, and this application was made with a view of attaching certain debts supposed to be due to the company. The matter had in the first place been before Hannen, J., at

1869

DICKSON v. NEATH AND BRECON RAILWAY CO.

chambers, and was by him referred to the Court. The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 60, enacts that "it shall be lawful for any creditor who has obtained a judgment in any of the superior courts to apply to the Court or a judge for a rule or order that the judgment debtor should be orally examined as to any and what debts are owing to him before a master of the court, or such other person as the Court or a judge may appoint; and the Court or a judge may make such rule or order for the examination of such judgment debtor, and for the production of any books or documents, and the examination shall be conducted in the same manner as in the case of an oral examination of an opposite party before a master under this act."

[*Bridge* appeared for the secretary, but as regarded him the rule was abandoned.]

Gates, for the directors, shewed cause in the first instance. The directors are not judgment debtors individually, and s. 60 of the Common Law Procedure Act, 1854, does not apply to a corporation or to the persons who constitute it. By the 51st section it is specially provided that "any of the officers" of a body corporate may be required to answer interrogatories where the body corporate is a party. But in the later section there is no corresponding provision, which tends to shew that no corresponding power was intended to be conferred. In *Kingsford* v. *Great Western Railway Company* (1), the attorney of a corporation, plaintiffs in an action, was allowed to make an affidavit for discovery under s. 50 of the Common Law Procedure Act, 1854, although the section (see *Christopherson* v. *Lotinga* (2)) requires the affidavit of the "party" to the action. But that case was decided on the ground that it was intended that all suitors should have the benefit of discovery, and the principle of the decision ought not to be extended.

[CHANNELL, B. In *Lacharme* v. *Quartz Rock Mariposa Gold Mining Company* (3), an order for inspection was made on a *director* of a joint-stock company, in an action against the company.

KELLY, C.B. In that case one of the learned judges (Martin, B.)

(1) 16 C. B. (N.S.) 761; 33 L. J. (C.P.) 307.

(2) 15 C. B. (N.S.) 809; 33 L. J. (C.P.) 121.

(3) 1 H. & C. 134; 31 L. J. (Ex.) 335.

at least appears to have considered that a director was an "officer" for the purposes of discovery within the meaning of 17 & 18 Vict. c. 125, s. 50. (1)]

The order there was for inspection, as to which there was a common law right.

[CHANNELL, B. The word "judgment debtor" undoubtedly includes a corporation. Your objection is, that although this be so, the directors are not the corporation, and that s. 60 of the act provides no machinery for their being examined.]

The right to examine is entirely statutory, and the language of the statute does not admit of the examination of persons who are not the actual judgment debtors in the action.

J. O. Griffits, in support of the rule. Section 60 ought to be as liberally interpreted as the previous sections as to discovery and interrogatories. Now in ss. 50, 51, it is true that there is an express provision as to bodies corporate who are allowed to put forward an officer to answer or make discovery. But in s. 50 there is no such provision, so far as the party applying for discovery is concerned. Yet although in *Christopherson* v. *Lotinga* (2) an affidavit *by the party* himself was held to be essential, in *Kingsford* v. *Great Western Railway Company* (3), the *attorney* of a body corporate was allowed to make the affidavit, the corporation being personally incapable of doing so. The case of *Lacharme* v. *Quartz Rock Mariposa Gold Mining Company* (4) is a strong authority for this application; it was really decided on the 50th section of the Common Law Procedure Act, 1854, and was based on the fact that the directors were the real judgment debtors.

[PIGOTT, B. The same observation might be applied to each shareholder.]

Granting that it might, the Court would always exercise the

(1) By s. 50, upon the application of either party to a cause, "upon an affidavit by such party," of his belief that any document, to the production of which he is entitled for the purpose of discovery, or otherwise, is in the possession or power of the opposite party, an order for discovery may be made on the party against whom such application is made, or if such party be a body corporate upon "some officer to be named of such body corporate."

(2) 15 C. B. (N.S.) 809; 33 L. J. (C.P.) 121.

(3) 16 C. B. (N.S.) 761; 33 L. J. (C.P.) 307.

(4) 1 H. & C. 134; 31 L. J. (Ex.) 334.

1869

DICKSON v. NEATH AND BRECON RAILWAY CO.

discretion which belongs to them, and only order the examination of the actual managers of the company. Corporations are certainly "judgment debtors" under the 61st section for the purposes of an attachment of debts due to them; yet they cannot be personally examined with a view to find out if any such debts exist, although an examination is often absolutely necessary to make the act effectual. It is not, under such circumstances, a violent construction to hold that s. 60 authorizes the examination of the directors, or those of them whom the Court may think fit.

KELLY, C.B. I am of opinion that this rule should be discharged. The 60th section of the Common Law Procedure Act, 1854, enables a judgment creditor under certain circumstances to administer an oath to the judgment debtor, and to cause him to answer upon oath as to what debts are owing to him, and from whom they are due, in order that they may be attached by the judgment creditor. The question before us now is whether this provision can be by any possibility applied to a corporation. Now, if we were to make the order claimed by this rule, we should assume that the directors of this incorporated company are the defendants in the action, whereas they are in truth nothing of the kind. The words of the section are that "it shall be lawful for any creditor who has obtained a judgment in any of the superior courts to apply to the Court or a judge for a rule or order that the judgment debtor should be orally examined as to any and what debts are owing to him;" and, doubtless, if an oath could be administered to a corporation, an order under the section might be made. But a corporation cannot be sworn. To whom then can the oath be administered? To persons, it is said, who are managing the company, or to some officer of the company. We find, however, that in s. 51, which concerns interrogatories, the legislature have expressly provided that the officer of a company may be interrogated. There is no corresponding provision in s. 60, and to introduce it would be to usurp the functions of the legislature and to introduce into the act a power not to be found there upon the true and natural construction of the words used.

PIGOTT, B. I am of the same opinion. The words "judgment debtor" unquestionably apply to a corporation, but the words

"oral examination" do not. It is manifest there is no way of putting a body corporate upon oath. It might, perhaps, have been expected that an express provision as to corporations would have been inserted in s. 60, as was done in s. 51, although reasons may be suggested for a distinction being made between the machinery provided for ascertaining for the purpose of attachment, debts due to an individual and debts due to a corporation. The latter are likely to be more notorious or easier of discovery than the former. Whether the legislature, however, omitted to give power to examine the directors or officers of a corporation, advisedly or not, I have no doubt that as the section stands, we cannot make the order claimed. The rule must therefore be discharged.

CLEASBY, B., concurred.

CHANNELL, B. I have entertained considerable doubt in this case, for I have always been desirous to construe the language of the Common Law Procedure Acts in the most liberal manner. The question depends on s. 60 of the Act of 1854, under which alone, if at all, we have power to make this order. Now, in the case of *Lacharme* v. *Quartz Rock Mariposa Gold Mining Company* (1), I am inclined to think the Court did not base their decision wholly on the ground that a director was an "officer" within the meaning of s. 50, and that being so, it appears to me that applying the principle of that case to s. 60, this order might be made. By the construction we now place on it we certainly limit the benefit the act was passed to confer. However, as the Lord Chief Baron and my learned brethren are clearly of opinion that we have no power to make the order, I am not prepared to differ from them. I therefore concur in the discharge of this rule, though I am not altogether satisfied that we are bound to place so narrow a construction on the section.

Rule discharged.

Attorneys for plaintiff: *Vizard & Co.*
Attorneys for directors: *Morris & Co.*

(1) 1 H. & C. 134; 31 L. J. (Ex.) 334.

1869
Jan. 26.

PEARSE and Others *v.* COAKER.

Action for Mesne Profits—Evidence—Judgment by default in Ejectment—Common Law Procedure Act, 1852 (15 & 16 *Vict. c.* 76), *ss.* 168, 170—*Rule* 112, *Hilary Term*, 1853—*Evidence of Defendant's Possession—Pleading—Costs of Ejectment—Practice in Ejectment.*

In an action of trespass for mesne profits the plaintiffs proved that the defendant had had a lease of the premises (which was not produced), and that he had paid a yearly rent of 327*l.* 10*s.*, but when or for how long did not appear. They also gave in evidence a judgment by default in a previous action of ejectment for the same premises. By the writ in the ejectment, which was dated the 5th of February, 1868, they had claimed title as from the 28th of March, 1867:—

Held (per Kelly, C.B., Channell, Pigott, and Cleasby, BB.), that upon this evidence it sufficiently appeared that the defendant was tenant in possession of the premises at the date of the writ of ejectment, and that the plaintiffs were therefore entitled to mesne profits from that time up to the time of their obtaining possession of the premises.

Per Kelly, C.B., the judgment by default in the ejectment, taken alone, is no evidence of the defendant's possession of the premises at any time; neither for the period during which the plaintiffs claim title in the writ, nor at the date of the writ itself: *Ive* v. *Scott* (9 Dowl. 993), commented on.

Per Channell and Cleasby, BB., the judgment by default in the ejectment is primâ facie evidence that the defendant was in possession at the date of the writ, but is not evidence of his possession for the period during which the plaintiffs claim title in the writ.

The plaintiffs in their declaration alleged that they had "incurred great expense in recovering possession" of their land:—

Held, that under these words they were entitled to recover the costs of the previous action of ejectment.

Declaration. That the defendant broke and entered a messuage and land of the plaintiffs, called Whitechapel, in the parish of Bishopsnympton, in the county of Devon, and ejected the plaintiffs from possession thereof, and kept them so ejected for a long time, and during that time took and received to the use of the defendant all the issues and profits of the said messuage and land, "whereby the plaintiffs during all that time lost and were deprived of the issues and profits and the beneficial use and occupation thereof, and were prevented from letting the same, and incurred great expense in recovering possession of the said land and messuage."

Pleas: 1. Not guilty. 2. Not possessed. 3. Leave and licence.

The plaintiffs joined issue on these pleas; and for a further repli-

cation, replied by way of estoppel, as to so much of the second plea as related to the trespasses complained of in the declaration, between the 25th of March, 1867, and the 29th of February, 1868, that, on the 5th of February, 1868, for the purpose of recovering the plaintiffs' possession of the said messuage and land, a writ was issued out of the Court of Exchequer in the words and figures following:—[Here followed the writ verbatim. It was in the ordinary form, and was directed to Francis Watson Coaker, and all persons entitled to defend possession of the premises to which the plaintiffs thereby claimed to have been on and since the 25th of March, 1867, entitled, and to eject all other persons therefrom]. That Francis Watson Coaker, in the said writ mentioned, was and is the defendant, and was at the time of the issuing of the writ and during all the time between the 25th of March, 1867, and the 29th of February, 1868, tenant in possession of the messuage and land in the declaration mentioned; that the premises in the writ and in this action were the same; that the plaintiffs named in the said writ were and are the now plaintiffs; that the said writ was duly served on the defendant, and he had notice thereof, but no appearance was entered or defence made to the said writ; that afterwards such proceedings were had that the plaintiffs by the consideration and judgment of the Court recovered possession of the said messuage and land; that the said judgment is still in full force; and that afterwards and before this suit, that is to say on the 29th of February, 1868, possession was delivered to the plaintiffs in obedience to a writ of possession duly issued, and thereupon the plaintiffs entered into possession of the same, wherefore, &c.

Issue.

At the trial before Channell, B., at the Devon summer assizes, 1868, the plaintiffs gave in evidence the judgment by default in the action of ejectment. It was also proved that a lease of the property in question had been granted to the defendant some years previously (which, however, was not produced) and that the defendant had paid, but at what period did not appear, a yearly rent of 327*l.* 10*s.*; and that the costs in the ejectment were 26*l.* 12*s.* 4*d.* It was objected on the part of the defendant, for whom no witnesses were called, first, that there was no evidence of his having been at any time in actual possession of the premises,

1869

PEARSE v. COAKER.

or at least of his having been in possession for any period anterior to the date of the writ of ejectment; and that there was no evidence of the service of the writ; and, secondly, that the costs of the ejectment were not recoverable on the declaration as framed.

The learned judge directed a verdict for the plaintiffs for the costs of the ejectment, and for mesne profits, from the 25th of March, 1867, to the 29th of February, 1868, calculated with reference to the yearly rent alleged to have been paid by the defendant. Leave was reserved to the defendant to move to enter a nonsuit, or to reduce the damages by such sum as the Court should think fit.

A rule was obtained accordingly to enter a nonsuit on the ground that there was no evidence that the defendant was ever in possession of the premises, or had ever been served with the writ of ejectment; or to reduce the damages by the mesne profits which accrued between the 25th of February, 1867, and the 5th of February, 1868, and by the costs of the ejectment, on the ground, as to the mesne profits, that there was no evidence of the defendant's having been in possession at any time previous to the 5th of February, 1868, the day on which the writ of ejectment was dated, and as to the costs on the ground that they were not recoverable, not having been declared for in a proper form.

Jan. 22, 26. *Sir J. D. Coleridge, Q.C.* (*S.G.*), and *Pinder* shewed cause. In order to retain the verdict for the full amount the plaintiffs must prove, first, that they were entitled from the 25th of March, 1867, the day named in the writ; and, secondly, that the defendant was in possession during the corresponding period. As to the first point, the judgment in the ejectment, although by default, would formerly have been conclusive evidence of *title* from the day of the demise: *Aslin* v. *Parkin* (1); *Turner* v. *Cameron's Coalbrook Steam Coal Company* (2); *Litchfield* v. *Ready* (3): and since the Common Law Procedure Act, 1852, it is in a similar manner evidence of title from the day named in the writ: *Wilkinson* v. *Kirby*. (4) Again, the judgment is primâ facie evidence of the defendant's actual possession at the date of the writ, although perhaps, standing alone, not of his possession for the period corresponding to that during which

(1) 2 Burr. 665.
(2) 5 Ex. 932.
(3) 5 Ex. 939.
(4) 15 C. B. 430.

the plaintiffs claim title. The verdict, however, may be justified when the whole evidence is taken into account. At all events the plaintiffs are entitled to mesne profits from the 5th to the 29th of February, i.e. from the date of the writ to the execution of the writ of hab. fac. poss. The judgment could not have been regularly obtained in this case, except upon an affidavit of personal service of the writ on the "tenant in possession" (or his wife or some member of his family), either on the premises or elsewhere: Common Law Procedure Act, 1852, ss. 168, 170; Rule 112, Hil. T., 1853. (1) Here the defendant is described by name in the writ, and his possession and due service on him must be presumed or the judgment would not be regular. But the Court will assume the regularity of its own proceedings. It is true that the affidavit is merely one of service of the writ, but according to the Common Law Procedure Act, 1852, s. 168, the writ is to be directed to the persons in possession and by name.

[KELLY, C.B. The judgment might be perfectly regular, i.e., obtained on a proper affidavit, and yet the contents of that affidavit might be false. The judgment may be evidence of such an affidavit having been filed, but how does it prove that the affidavit was true?]

The plaintiffs ought, in the absence of evidence to the contrary, to be presumed to have spoken the truth. In *Waddington* v. *Roberts* (2), a memorandum of registration of a composition deed was held evidence that the necessary affidavit under the Bank-

(1) The Common Law Procedure Act, 1852, s. 168, enacts that "instead of the present proceeding by ejectment, a writ shall be issued directed to the persons in possession by name and to all persons entitled to defend the possession of the property claimed, which property shall be described in the writ with reasonable certainty."

S. 170 enacts that "the writ shall be served in the same manner as an ejectment has heretofore been served, or in such manner as the court or a judge shall order, and in case of vacant possession, by posting a copy thereof upon the door of the dwelling-house or other conspicuous part of the property."

Rule 112, Hilary Term, 1853, orders that "no judgment in ejectment for want of appearance . . . . shall be signed without first filing an affidavit of the service of the writ according to the Common Law Procedure Act, 1852, and a copy thereof; or, where personal service has not been effected, without first obtaining a judge's order or rule of court authorizing the signing such judgment: and such rule or order, or a duplicate thereof, shall be filed together with a copy of the writ."

(2) Law Rep. 3 Q. B. 579.

1869

PEARSE v. COAKER.

ruptcy Act, 1861, s. 192, had been filed, and it was further held unnecessary to prove the truth of the facts stated in it. It may be said that this judgment may have been signed on a "vacant possession," but the Court will not presume that the premises were vacant where there is evidence that they were not, as there is in this case, the defendant having paid rent for them under a lease. The only presumption, therefore, that can be made, is that the defendant was tenant in possession at the date of the writ. The defendant would have been at liberty to prove he was not such tenant at the trial, but not having done so it must be taken that he was.

[CHANNELL, B. There is no plea raising such an issue in this case.]

He might have had the judgment set aside as irregular at the plaintiffs' cost if he really was not in possession, but having allowed it to stand it is sufficient evidence to shift the onus of proof from the plaintiffs to him. With regard to the damages, the plaintiffs have clearly a right to the costs of the ejectment in addition to mesne profits: *Nowell* v. *Roake* (1); *Doe* v. *Filliter* (2); and the language of the declaration is sufficient to include a claim for them.

H. T. Cole, Q.C., in support of the rule. The costs of the ejectment should have been claimed specially; but should the declaration be held sufficient, it must be admitted that they are recoverable, if the plaintiffs are entitled to a verdict at all. But in this case the plaintiffs ought to be nonsuited. There is no evidence of actual possession by the defendant during any definite period. A rent was paid, but it does not appear when or for how long; and the judgment in the ejectment is proof of the plaintiff's title, but of nothing else. It may have been obtained not after service of the writ on the defendant, but as on a vacant possession. Either alternative is equally probable, and that being so, neither ought to be presumed. Or, granting that the Court will presume the judgment to have been founded on a proper affidavit of service, still the truth of the facts therein stated ought to have been proved aliunde: Cole on Ejectment, pp. 241, 242, 715; *Hunter* v. *Britts* (3); *Doe* d. *James*

(1) 7 B. & C. 404. (2) 13 M. & W. 47.
(3) 3 Camp. 455.

1869

PEARSE v. COAKER.

v. *Stanton.* (1) In *Aslin* v. *Parkin* (2), independent evidence of the defendant's possession was given: See also *Doe* v. *Harvey* (3); *Matthew* v. *Osborne* (4); *Dodwell* v. *Gibbs.* (5) At the most, no more can be recovered than mesne profits from the date of the writ; and *Ive* v. *Scott* (6) is an authority that not even these are recoverable.

[CLEASBY, B. There the judgment by default in question was not in the ejectment, but in the action for mesne profits itself.]

The case involves a decision to the effect that a judgment by default in ejectment is no evidence of possession, even at the date of the writ.

KELLY, C.B. This is an action of trespass for mesne profits, and upon these pleadings the plaintiffs, in order to succeed, must according to the rules of evidence as accurately laid down in Roscoe's Nisi Prius, 11th ed., p. 578, prove their title and re-entry, the defendant's liability by reason of possession and the amount of damages. Now, here the plaintiffs have certainly proved their title by producing the judgment by default in the action of ejectment. The case of *Aslin* v. *Parkin* (2), shews that such a judgment is good evidence of title in an action for mesne profits. The next point is the re-entry, which has also been satisfactorily established. And then comes the question, whether there was any evidence of actual possession by the defendant, or that he kept the plaintiffs out. It is contended that the judgment by default in the ejectment was primâ facie evidence of actual possession by the defendant, inasmuch as if regular, as we must assume that it was, it must have been founded necessarily on an affidavit of the service of the writ according to the Common Law Procedure Act, 1852, either personally on the tenant in possession, or by posting up a notice on the premises in the case of a vacant possession. I am of opinion that it is not such evidence. It is stated in Roscoe's Nisi Prius, 11th ed., p. 580, that "the judgment in ejectment is not evidence of the time during which the defendant has been in possession." Before the Common Law Procedure Act, 1852,

(1) 2 B. & A. 371.
(2) 2 Burr. 665.
(3) 8 Bing. 239.
(4) 13 C. B. 919.
(5) 2 C. & P. 615.
(6) 9 Dowl. 993.

1869

PEARSE v. COAKER.

the "consent rule" admitted possession by the defendant at the time of the service of the declaration; but if the plaintiff sought damages for an earlier period, there must have been further evidence of the possession," and several cases are cited as authorities for the language of the text. It may, however, be said that although the proceedings in ejectment are no evidence of the length of time during which the defendant may have been in possession, still that they are evidence of possession at the time when the writ was served, or at which it was dated. But it appears to me clear from *Ive* v. *Scott* (1), that the judgment is not evidence of the defendant's possession at all. There, it is true, the judgment by default immediately in question, was in the action for mesne profits itself. It was therefore unnecessary in that action to offer any evidence of the mere fact of actual possession at some time. The only dispute had been before the under sheriff on a writ of inquiry as to the amount of damages. The under sheriff had directed a verdict for nominal damages only, and the point decided was, that the defendant by suffering judgment by default in the action of trespass, had not admitted the days in the declaration during which he was alleged to have been in possession. The verdict, therefore, stood—a rule to set it aside being refused. The importance of the case arises from the fact that the verdict, for nominal damages only, was not disturbed. Now, if the judgment in the action of ejectment, which must have been produced to prove the other part of the case, had been held to be evidence of the defendant's possession at the date of the writ, the under sheriff's ruling must have been wrong, because the plaintiff would then have been entitled to the value of the premises from the time of the commencement of the action of ejectment, to the time when he obtained repossession, i.e., to something more than nominal damages; and the under sheriff can only have been held to be right on the ground that proof of actual possession from that time was necessary, and that it had not been supplied. Therefore, notwithstanding any presumptions of law which ought to be made with regard to the regularity of the proceedings in ejectment, the plaintiffs, in my opinion were, so far as the case depends on the judgment in the ejectment, without evidence of actual possession

(1) 9 Dowl. 993.

by the defendant at any time, and had no other evidence been adduced, would not be entitled to recover a verdict.

But I think there is sufficient evidence aliunde, that the defendant was for some period in possession, for it was proved that he had a lease, and that he paid a yearly rent of 327*l.* 10*s.*, and this he would not have done except as being tenant in possession of the premises. The only remaining question, accordingly, is as to the amount of damages, and on this point there is no direct evidence of how long the defendant had been in possession. But it is certain that his occupation could not have begun after the commencement of the action of ejectment. It would be absurd to suppose that it did. We are therefore justified in coming to the conclusion, that on the 5th of February, 1868, he was in possession of the premises. Then it appears that the writ of hab. fac. poss. was not executed until the 29th, and the plaintiffs ought to recover the mesne profits accruing between these two dates, as measured by the yearly rent payable. The verdict, therefore, should be reduced to an amount made up of the proper proportion of rent for those twenty-four days, and of the costs of the ejectment, to which under this declaration I entertain no doubt that they are entitled.

CHANNELL, B. The rule in this case asks either for a nonsuit or to reduce the damages. As to the first alternative, I am of opinion that it ought to be discharged. Taking the Lord Chief Baron's view of the evidence adduced, both documentary and parol, there can be no doubt that the plaintiffs are entitled to some verdict. But I am, for myself, prepared to say that the judgment by default would, of itself, have entitled the plaintiffs to a verdict. I agree that under the old practice a plaintiff had to prove title on the day of the demise, and frequently it was a question of considerable nicety as to whether he had succeeded in doing so. Now it cannot be doubted that a judgment, though by default, in ejectment is proof of title in an action for mesne profits, as from the day of the demise or the day named in the writ of ejectment. It did not, however, nor does it now, prove *possession* by the defendant for a corresponding period. That must be established independently in order to entitle a plaintiff to mesne profits for the whole interval.

1869

PEARSE v. COAKER.

In the absence of any further evidence he would be entitled to a verdict indeed, but not to damages from the day named in the writ as that on which the plaintiff had a right to eject. And in this case, therefore, I should be ready to hold that no nonsuit ought to be entered, even had there been no parol evidence at all.

As to the damages, I am not prepared to say that the plaintiffs are not entitled to a larger sum than that mentioned by the Lord Chief Baron, but I do not wish to differ from him on this point. The evidence shews that the defendant held under a lease, and that he had paid rent at the rate of 327*l.* 10*s.* a year. The lease might indeed possibly have been granted on the day before the writ of ejectment was issued. But even on that supposition, the plaintiffs are at all events entitled to a verdict for 26*l.* 14*s.*, being the costs of the ejectment, the claim for which is, I think, sufficiently laid in the declaration; and also to a sum equivalent to twenty-four days rent at the rate of 327*l.* 10*s.* a year, and the rule should be made absolute to reduce the verdict to a sum made up of these two amounts.

PIGOTT, B. If it had been necessary in this case to decide whether the proceedings in the action of ejectment, standing alone, were evidence or not of the defendant's actual possession at or previous to the date of the writ, I should have wished for further time before coming to a decision. But the case is really to be determined on the plain facts proved. Here there was a judgment in a previous action of ejectment, and in my opinion, sufficient parol evidence to warrant the conclusion that the defendant was in possession at the time of the service of the writ of ejectment, and indeed anterior to that time. It was established distinctly that the defendant was holding the premises under a lease at a given rent. We cannot under such circumstances say that there was no evidence of his having ever been in actual possession. Then as to the amount of damages to which the plaintiffs are entitled, I agree with the Lord Chief Baron, and my Brother Channell. A jury might, perhaps, be justified in giving something additional, for they would not be likely to think that the lease was granted one day and a writ of ejectment served on the next. Still, in strict law, the plaintiffs are only entitled to the mesne profits accruing

between the 5th and 29th of February, and to the costs of the ejectment.

1869

PEARSE v. COAKER.

CLEASBY, B. I am also of opinion that the rule, so far as it seeks to enter a nonsuit, should be discharged, but that it should be made absolute to reduce the damages. With regard to the effect of the judgment by default in the ejectment, I avail myself of the observations made by my Brother Channell. The judgment is one in the modern action of ejectment, which is the creature of the Common Law Procedure Act, 1852. From that act it appears that the writ must be directed to the defendant by name, and the judgment which follows sets out the terms of the writ (Schedule A., No. 14, Common Law Procedure Act, 1852). But the writ is also to be directed to the tenant in possession (Common Law Procedure Act, 1852, s. 168), and this Court, from which the writ is issued, ought, therefore, in my opinion, to say that the defendant named in the judgment which embodies the writ was, at the date of that writ, the tenant in actual possession.

It is true that the defendant is not thereby estopped absolutely from shewing that he never was in possession; but here the question is, whether in the absence of any evidence to the contrary, we ought not to consider our own proceedings primâ facie regular and valid. Under the old law, the rule was the same as I now conceive it to be. The judgment was primâ facie, though not conclusive, evidence. If it is not evidence against the defendant to this extent, I do not see why it should be evidence of the plaintiffs' title at all. But that it unquestionably is, and therefore it seems to me that it is evidence against the defendant of possession at the date of the writ, without reference to any extrinsic evidence which may be adduced.

Upon this view of the judgment, the plaintiffs are entitled to recover the two items of damages referred to, viz., the costs of the ejectment, which I think recoverable under the declaration as framed, and the mesne profits from the date of the writ. It is unnecessary to decide how far the modern judgment is evidence of *title*, as from the day named in the writ, which may and in this case does long precede the date of the writ itself. Under the old practice, the judgment was, that the plaintiff should recover "the

1869

PEARSE v. COAKER.

term," and no doubt that was evidence of title from the day of the demise. But now the judgment is merely for the recovery, not of the term, but of the premises, and this may, perhaps, make a difference.

With regard to the defendant's possession, I do not think the judgment proves more than that he was in possession on the day of the date of the writ. The extrinsic evidence does not seem to me satisfactory; but on the written evidence alone I think the plaintiffs can recover the costs and the mesne profits from the 5th to the 29th of February.

Rule to enter a nonsuit discharged, and absolute to reduce the damages.

Attorneys for plaintiffs: *Mercer & Mercer.*
Attorneys for defendant: *Whitaker & Woolbert.*

Jan. 26.

ALEXANDER AND OTHERS *v.* SIZER.

Promissory Note — Signature in Representative Character—Note Signed "as Secretary" of an Incorporated Company—Personal Liability of Maker.

6 QB 362.

The following promissory note was signed by the secretary of an incorporated company:—"1500*l.* On demand I promise to pay Messrs. Alexander and Co., or order, the sum of one thousand five hundred pounds, with legal interest thereon until paid, value received the 16th of August, 1865. For Mistley, Thorpe, and Walton Railway Company.—John Sizer, secretary." In an action on the note by the payees against the secretary:—

Held (per Kelly, C.B., and Pigott, B., Cleasby, B., hesitating), that he was not personally liable.

DECLARATION by payees against the maker of a promissory note in the following form:—"1500*l.* On demand, I promise to pay Messrs. Alexander & Co., or order, the sum of one thousand five hundred pounds, with legal interest thereon until paid, value received, the 16th of August, 1865.

"For Mistley, Thorpe, and Walton Railway Company,

"John Sizer, secretary.

"Witness—Charles Taylor."

The defendant traversed the making of the note. Issue.

1869

ALEXANDER v. SIZER.

At the trial before Martin, B., at the Middlesex sittings after Michaelmas Term, 1868, it appeared that the defendant was secretary of the Mistley, Thorpe, and Walton Railway Company, and that he had signed the note declared upon in pursuance of a resolution passed at a meeting of the directors of the company, authorizing him to do so. The company, and not the defendant personally, received the benefit of the money advanced. In the special act under which the company was incorporated, there were borrowing powers to a specified extent, but there was nothing which conferred on the directors any power to bind the company by bills or notes. The plaintiffs sought in this action to recover the amount of the note in question from the defendant personally. A verdict was entered for the plaintiffs, with leave to move to enter a verdict for the defendant. A rule was obtained accordingly, on the ground that the defendant was not personally liable on the note.

Henry Matthews, Q.C., and *Joyce* shewed cause. The company, in this case, are not liable, for the words of the note do not profess to bind them; and even were it otherwise they would not be liable, for they have no extraordinary borrowing powers under their special act enabling them to accept or make bills or notes: *Bateman* v. *Mid-Wales Railway Company.* (1) But the defendant is personally liable: *Goupy* v. *Harden* (2); *Leonard* v. *Robinson.* (3) He has chosen to make the note personally, using the words "*I* promise," and that being so, the mere addition of his description to his signature does not limit his responsibility: *Leadbitter* v. *Farrow* (4); *Healey* v. *Story* (5); *Nichols* v. *Diamond* (6); *Mare* v. *Charles.* (7)

Philbrick, in support of the rule. The form of the note is distinct and unambiguous, and proves that the defendant is not personally liable. The use of the word "I" is not of itself enough to fix him personally. Bank notes are drawn in the same form, yet there is no responsibility incurred by the person who signs, "for the governor and managers." In *Healey* v. *Story* (5), the note was

(1) Law Rep. 1 C. P. 499.
(2) 7 Taunt. 159.
(3) 5 E. & B. 125.
(4) 5 M. & S. 345.
(5) 3 Ex. 3.
(6) 9 Ex. 154.
(7) 5 E. & B. 978; 25 L. J. (Q.B.) 119.

1869

ALEXANDER v. SIZER.

"joint and several," and these words were held to imply a personal undertaking to pay. In *Mare* v. *Charles* (1), the bill was directed to the defendant, as an individual. In *Nichols* v. *Diamond* (2), the defendant was himself a member of the company, which was not incorporated. The fact that the note may be void against the company will not make it good against the defendant: *Aggs* v. *Nicholson*. (3) In *Lindus* v. *Melrose* (4), a note very similar to the present was signed by three directors of a company. It was held that they were not personally liable.

KELLY, C.B. I think that this rule should be made absolute. The question is whether the defendant, in signing a promissory note, has made himself personally liable upon it. In other words, is the note his note or that of the company, signed by him as their officer? Now, looking at the terms of the note itself, it seems to me that it does not, on its face, purport to be a personal contract. If it had been so, and had been made on some consideration moving towards him personally, it would have been signed "John Sizer," and no more. But we find that, although in the body of it the personal pronoun "I" is used, it is signed "John Sizer, *secretary*," for the company. Unless intended to be the company's note, and not his own, it is difficult to see why it was signed as "secretary" at all, or why the company's name was introduced into it. I have no doubt it was signed by the defendant only as secretary, and was intended as the note of the company.

But then it is said we cannot treat it in this light, the company having no power under their acts to make promissory notes; and our attention is directed to the fact that it is framed in the singular number. But no other form would have been more appropriate. The ordinary bank notes of the Bank of England are exactly in the same form, with the exception that the person signing them adds no description to his name. Yet it has never been supposed that he would be personally liable. Here, not only is the note in the same form (both being framed in the singular number), but the signature has appended to it the word "secretary," shewing,

2 Jur. N.S. 234

(1) 5 E. & B. 978; 25 L. J. (Q.B.) 119.
(2) 9 Ex. 154.
(3) 1 H. & N. 165; 25 L. J. (Ex.) 348.
(4) 2 H. & N. 293; S. C. in Ex. Ch. 3 H. & N. 177; 27 L. J. (Ex.) 326.

3 Jur. N.S. 619, 4 Jur. N.S. 48

in my opinion, still more clearly that the note was the company's note, and intended to bind them alone.

With regard to the authorities which have been cited, some refer to promissory notes, others to bills of exchange. To the latter I will allude immediately. As to those which concern promissory notes, those cited by the plaintiffs seem to me to be distinguishable. In *Leadbitter* v. *Farrow* (1) there were words in the bill indicating the account to which the amount of it was to be placed, but these words do not affect the legal obligation of the promisor. The effect of the whole document was, "I promise to pay a certain sum, but it is to be placed to a particular account," a limitation which does not in any way affect the responsibility of the person signing it. The language of the judgment, indeed, is favourable to the defendant. "Is it not a universal rule," says Lord Ellenborough, "that a man who puts his name to a bill of exchange makes himself personally liable, unless he states on the face of the bill that he subscribes it for another, or by procuration of another, which are words of exclusion? Unless he says plainly, 'I am the mere scribe,' he becomes liable." In this case the defendant has, in my opinion, said so. His signature is distinctly not personal, but as "secretary." Again, in *Healey* v. *Story* (2), the note was signed and was in a form which removed all doubt as to its meaning. Two persons promised by it "jointly and severally." This, therefore, was necessarily of itself a personal obligation. Next, as to the other cases cited on behalf of the plaintiffs, they were all cases not of notes but of bills of exchange, where the acceptor, though he may purport to accept in some manner limiting his personal liability, becomes liable if he does accept. He cannot vary or limit his liability on the contract; and by his acceptance of the bill, which is addressed to him, it becomes his contract, and words of mere description or qualification are not enough, according to the usage of merchants, to exonerate him. If express words of exclusion were to be used, the result might be different, but then the acceptance would in fact be no acceptance at all. Bills of exchange are all drawn on the intended acceptor, in a personal character, and if he accept them he must be held to have done so in that character, and will be held liable,

(1) 5 M. & S. 345. (2) 3 Ex. 3.

1869

ALEXANDER v. SIZER.

no matter what words of mere description may be added to his name.

Then, coming to the cases cited by the defendant, I am unable to distinguish this case from *Lindus* v. *Melrose*. (1) There three of the directors of an incorporated company signed a note by which they "jointly promised" to pay 600*l*., and to their signatures they added their description, "directors," and the instrument being a note, and not a bill of exchange, they were held not to be liable. *Aggs* v. *Nicholson* (2) is much to the same effect. It is, however, rather a stronger case than the present, for in the body of the note in that case the makers were described as agents. Still, upon the whole, looking to the whole of this note, I am constrained to the conclusion that the defendant signed as secretary only. The rule must therefore be made absolute.

PIGOTT, B. This question is a very arguable one, but in the esult I agree with the Lord Chief Baron. No doubt, as is laid down in *Lindus* v. *Melrose* (1), a man is personally liable on an instrument, unless it clearly appears on the face of the instrument that he is an agent only. Is he so here? Mr. Matthews contends the contrary, and lays much emphasis on the word "I," as shewing personal liability, in the body of the note. But in any other form the note would have been ungrammatical, and the form, which is the same as is used in an ordinary Bank of England note, does not in this case any more than in that necessarily create a personal liability. Here, moreover, the defendant signs "as secretary" for the company, and the fair construction of the note, I think, is that he signed as an agent only. The money was no doubt for the purposes of the company, and although strictly speaking that does not affect the question, still, as Pollock, C.B., observes, in *Lindus* v. *Melrose* (3), the surrounding circumstances may be looked at in order to enable the Court to come to a right conclusion, and the circumstance that the money was to go, and did go, to the company, and not to the defendant, fortifies me in the opinion I have already expressed. The cases cited for the plaintiffs appear to me

(1) 2 H. & N. 293; 3 H. & N. 177; 27 L. J. (Ex.) 326.
(2) 1 H. & N. 165; 25 L. J. (Ex.) 348.
(3) 2 H. & N. at p. 297; 27 L. J. (Ex.) at p. 328.

1869

ALEXANDER v. SIZER.

to be all distinguishable, and I therefore think the rule should be made absolute.

CLEASBY, B. The question here is really in what character did the defendant sign the note. Did he sign for himself or for the company? Looking at the whole instrument together, and giving full effect to the use of the pronoun "I" in the body of it, I think it may be fairly contended that the signature was to be by one person only, and that the person who did sign it assumed thereby a personal liability. But I do not entertain so strong an opinion on the subject as to cause me to differ from the view expressed by the Lord Chief Baron and my Brother Pigott, and I therefore concur with them, though with some hesitation, in the opinion that the rule should be made absolute.

Rule absolute.

Attorneys for plaintiffs: *Walker & Griffiths.*
Attorneys for defendant: *Doyle & Edwards.*

JOHNSON *v.* OSENTON.

Jan. 23.

Deed under Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *s.* 192—*Assent—Conveyance of Property—Bills of Sale Act*, 1854 (17 & 18 *Vict. c.* 36), *ss.* 1, 7 —*Signature by Clerk—Authority to sign.*

Assents to a deed under s. 192 of the Bankruptcy Act, 1861, must be absolute and unqualified.

It does not prevent the operation of a deed as a conveyance at common law, that it is expressed to be intended to operate as a deed under s. 192 of the Bankruptcy Act, 1861, and that not being duly assented to, it cannot so operate.

A judgment debtor, anticipating the immediate levy of execution, executed an assignment of all his property to a trustee, who joined with him in a covenant to pay a composition of 2*s.* in the pound to his creditors, and who was to hold the property on trust, first, to pay the costs; secondly, to repay himself the money paid by him in respect of the composition, with an ultimate trust of the surplus (if any) for the debtor. The deed was expressed to be intended to operate under s. 192 of the Bankruptcy Act, 1861.

A necessary assent appeared on its face to be given by one creditor on behalf of himself and three others, *without prejudice to their rights under a former trust deed.* The assent was actually signed by a clerk of the creditor's town agents, the creditor having telegraphed to them to sign for himself and the other three; it did not appear that the limitation in the assent was required by the telegraphic instructions:—

Held, that, although the signature by the clerk was otherwise a valid signature

1869

JOHNSON v. OSENTON.

on behalf of these creditors, yet the assent was not valid, because it was not absolute and unqualified, and also because it did not appear to be in pursuance of the instructions:—

Held, also, that, notwithstanding the deed appeared on its face to be intended to operate under s. 192 of the Bankruptcy Act, 1861, it could not be taken to be an escrow; and that, although in that respect it could not operate as was intended, it conveyed the property comprised in it to the trustee.

INTERPLEADER issue, tried before Martin, B., at Westminster, on the 3rd of November, 1868. The following facts were proved at the trial.

On the 29th of July, 1868, at the Surrey summer assizes, the defendant obtained a verdict against one S. T. Prior, with immediate execution.

On the 1st of August, Prior executed a deed by which he, and the plaintiff Johnson as surety, jointly and severally covenanted with all the creditors of Prior to pay them a composition of 2*s.* in the pound on the 29th of October next; and Prior assigned and granted to Johnson all his "stock in trade, money, credits, real and personal estate and effects whatsoever," on trust at his discretion to realize the same, and to apply the moneys, first, in payment of costs; secondly, towards the repayment to Johnson of all moneys paid by him to the creditors of Prior in respect of the composition; and as to the surplus (if any) in trust for Prior. The deed contained a release from the creditors to Prior, and it concluded with the following clause: "And it is hereby lastly agreed and declared that these presents are intended to operate, and shall (so far as lawfully may be) operate as a trust and composition deed for the benefit of creditors within the provisions of the Bankruptcy Act, 1861, and be binding on all the creditors of the said S. T. Prior, including those who do not execute the same or assent thereto, and that so soon as a majority in number, representing three-fourths in value, of the creditors of the said S. T. Prior shall have executed or in writing assented to these presents, it is intended that the same shall be registered in the court of bankruptcy under s. 192 of the Bankruptcy Act, 1861, in order that the said S. T. Prior may obtain the protection of the court as provided by s. 198."

There was some doubt upon the evidence whether possession was actually delivered to Johnson, and when the execution was

put in on the 3rd of August, Prior was in possession; but the validity of the deed under s. 192 of the Bankruptcy Act, 1861, turned upon the sufficiency of the assents. To make up the requisite number it was necessary to rely on an assent given in the following form:—

"We approve of the trust deed executed by the debtor on the 1st of August instant on behalf of the Writhlington Coal Company, the Frome Permanent Building Society, the executors of the late W. Rabbits, and ourselves, without prejudice in any way to the rights of the above-named creditors and ourselves under the first trust deed executed by the debtor, and also without prejudice to the securities held by any of the above creditors.

(Signed) "Prior & Bigg,

"For Cruttwell & Daniel, Solicitors, Frome.

"1st of August, 1868."

It appeared (though the evidence was not very clear) that Cruttwell had either verbally, or in writing, authority from the three other creditors to assent, and that having this authority he telegraphed to his agents, Messrs. Prior & Bigg, to assent in writing; the assent however was actually written and signed by the managing clerk of Prior & Bigg. It did not appear whether the authority to Cruttwell & Daniel, or their telegram to Prior & Bigg, contained any such reservation as was introduced into the written assent. The earlier deed was not produced.

It was contended for the plaintiff (and was denied by the defendant) that the assent was shewn to be authorized, and was formal and valid; but that if not, and the deed could not for that reason operate as a deed under s. 192 of the Bankruptcy Act, 1861, it was a good conveyance of the property to Johnson, and therefore defeated the right of the execution creditor.

A verdict was taken for the plaintiff, with leave to the defendant to move to enter a verdict for him on the ground that the deed was not duly assented to under the Bankruptcy Act, 1861, and that it did not pass the property to Johnson as against an execution creditor. A rule having been obtained accordingly.

Atkinson, Serjt., and *Eyre Lloyd*, shewed cause. The authority to Cruttwell & Daniel is sufficiently proved, and if so, the assent

1869

JOHNSON v. OSENTON.

given by them on behalf of all four creditors is valid. For, they having once exercised their authority by electing to assent, and manifesting that determination by the telegram, whatever further was done was merely ministerial. Neither Prior & Bigg themselves, nor their clerk, had any discretion; they were only the hand to affix the signature to the written assent; and *Lord* v. *Hall* (1), and the case there cited by Maule, J. (2) of *Ex parte Sutton* (3), shew that there is nothing in such a proceeding to contravene the legal principle relied on by the defendant, forbidding the delegation of authority. The supposed reservation in the assent does not affect its validity, for until it is shewn that the deed referred to derogates from the effect of the present deed it does not appear that any limitation or condition is really put on the assent, and certainly not that there is any injury to the other creditors; the assent must therefore be taken to be absolute. But if the deed is not valid under s. 192 of the Bankruptcy Act, 1861, it is nevertheless valid as a conveyance of property: *Symons* v. *George* (4); for there is nothing here, either on the face of the deed or on the extrinsic evidence, to shew it to have been delivered as an escrow.

Garth, Q.C., and *C. H. Anderson*, in support of the rule. The authority to Cruttwell & Daniel cannot be considered as proved, still less as executed. The signature is not even by those to whom they delegated the duty of signing, but by their clerk, who had no authority at all. But however validly subscribed, the assent is itself ineffectual; for an assent to a deed of this nature, as to any other transaction between parties, must be absolute and unconditional; a qualified assent is no assent at all. Still less can such an assent avail, when on the face of it it appears to reserve to the person assenting rights different from those of other persons interested under the deed, who are thus placed in an inferior position. The other creditors are, by the Bankruptcy Act, made parties to the deed, and they must be parties on an equal footing. Although, therefore, this may be valid as a deed registered under s. 194 of the Act: see *Ex parte Morgan* (5), and *Ex*

10 Jur (N.S.) 637; 10 L.T. 713

(1) 8 C. B. 627.
(2) At p. 631.
(3) 2 Cox, 84.
(4) 3 H. & C. 996; 34 L. J. (Ex.) 187.
(5) 1 D. J. & S. 288; 32 L. J. (Bkcy.) 15. 9 Jur (N.S.) 559.

parte Spyer (1), approved in *Pearson* v. *Pearson* (2): it cannot operate under s. 192, and therefore cannot operate so as to make the creditors parties, or to fulfil the intention of the debtor. And for the same reason it cannot operate so as to convey the property to Johnson; for the last clause of the deed shews that it was only intended to operate at all in the event of its being completed so as to make it operative under s. 192. This clause did not occur in the deed in *Symons* v. *George* (3), and it may be inferred from the language of Bramwell, B., in the court below (4), that if it had been present there the case would have been decided otherwise. Yet even supposing the deed to be otherwise good as a conveyance at common law, it is within the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), s. 1, and therefore not being registered within twenty-one days, and the property being in Prior's possession when execution was levied, it is void as against an execution creditor. (5)

KELLY, C.B. There are two questions in this case. The first is, whether the deed in question was duly assented to in writing under s. 192 of the Bankruptcy Act, 1861, and that depends on whether a valid assent was given by four firms of creditors. None of the four have actually executed the deed or signed an assent; but one firm has, it is said, assented on behalf of themselves and of the other three, and the question is, whether that assent is sufficient. It appears that in communications between them this firm was

(1) 1 D. J. & S. 318.

(2) Law Rep. 1 Ex. 308, 311.

(3) 3 H. & C. 996; 34 L. J. (Ex.) 187.

(4) 3 H. & C. at p. 74; 33 L. J. (Ex.) at p. 233.

(5) The Act (17 & 18 Vict. c. 36, s. 1) provides that every bill of sale of personal chattels shall be registered within twenty-one days after its making; and that otherwise it shall, as against (amongst others) "all sheriffs' officers and other persons seizing any property or effects" comprised therein, "and as against every person on whose behalf such process shall have been issued, be null and void to all intents and purposes whatsoever, so far as regards the property in, or right to the possession of any personal chattels comprised in such bill of sale which at or after the time . . . of executing such process . . . . *and after the expiration of the said period of twenty one days*, shall be in the possession or apparent possession of the person making such bill of sale." In the present case, however, not twenty-one, but only two days had elapsed between the making of the deed and the levy of the execution.

By s. 7 the Act defines the term "bill of sale," and excludes from its meaning (inter alia) "assignments for the benefit of the creditors of the person making or giving the same."

1869

JOHNSON v. OSENTON.

authorized to assent in the name of all to this deed; I say to this deed, because it must be taken that when men of business meet together and agree that the consent of all shall be given to the composition deed of a particular debtor, it must be taken that they know what they are talking about, and what is the authority they are giving. Therefore it must be taken that the three firms did authorize the fourth to assent to the deed in question on behalf of all. The whole additional evidence is that this fourth firm, Messrs. Cruttwell & Daniel, by telegraph, authorized and requested their agents, Messrs. Prior & Bigg, to sign an assent in writing. The assent, however, appears to have been written and signed, not by Messrs. Prior & Bigg, but by their managing clerk, by their instructions and under their authority. It is said that this was not a ministerial act, but the exercise of a discretionary power given originally to Cruttwell & Daniel, and that therefore the maxim, delegatus non potest delegare, applies. But I am of opinion that no question of delegated authority arises in this case. For Cruttwell & Daniel are quite aware of what they are assenting to, and all that can be said is, that instead of signing the assent themselves, they require their agents in London to sign it for them, and that they in their turn require their clerk to do it in their name. But neither Prior & Bigg, nor their clerk, are required to exercise, or do, in fact, exercise, the discretion (if any) reposed in Cruttwell & Daniel, and their signature is, in fact, the signature of Cruttwell & Daniel by their hand. So far, then, the assent is sufficient.

But two other objections have been raised to this assent, both of which are fatal. First, it is objected that the assent is in its form not within the terms of the statute, and I am of opinion that it is not. For an assent to a deed must be absolute and unconditional, not qualified by restrictions and limitations. If this kind of assent were allowed, then those creditors who had assented simply and absolutely would be bound without reference to any other deed or any interest created thereby, but these creditors might say—"there is another deed disposing differently of the property included in the present one, and under that we have a claim on the property in priority to the trusts of this deed;" and they might so derogate from the rights of the other creditors. It is said that as we have

not the earlier deed before us it does not appear that it contained anything contrary to the provisions of the deed in question; and that until this is shewn, the consent is not shewn to be qualified. But it lies on those who say that an assent qualified in its terms is not so in fact, to shew that there was nothing affecting the operations of the deed assented to; we must suppose that the words of qualification were intended to have some effect, and whatever that effect may be, it will prevent the assent from being absolute and unconditional.

But, further, there is no evidence of any authority from the three firms to Cruttwell & Daniel, or from Cruttwell & Daniel to Prior & Bigg to give any other than an unqualified assent; the authority, therefore, was exceeded by the introduction into the written assent of the words in question. On this double ground, therefore, that the assent produced being in its terms qualified was no assent at all, and that no authority has been proved from the creditors in question to assent in this form, the proof that the deed was duly assented to fails.

That being so, it becomes necessary to examine the title of the defendant independently of the operation of s. 192 of the Bankruptcy Act, 1861. The deed was no doubt intended to operate under that section, but it is contended that, though not effectual for that purpose, yet it contains an absolute assignment of the debtor's property to the trustee, by virtue of which the property had ceased to be the debtor's at the time of the seizure. On looking at the deed it appears to contain an unconditional and immediate transfer to the trustee, and there is no doubt that at common law this would operate to defeat the execution; but it is said that it does not so operate for three reasons. First, it is said that the deed is on the face of it an escrow; that it is expressed and intended to operate as a deed under s. 192 of the act, and that this clearly shews that its whole effect was intended to be made conditional on its validity as such deed. But I am clearly of opinion that the circumstance of this intention to comply with and take the benefit of the statute appearing on the deed does not prevent its delivery from operating as a perfect delivery. And when we consider the circumstances, and that the debtor, being in the possession of his stock in trade, expecting what actually occurred, and

1869

JOHNSON v. OSENTON.

being desirous of disappointing and defeating the plaintiff, did for that very purpose, before execution, convey away the whole of his property, it would obviously be an absurdity to suppose that it could ever be a question with the jury whether it was intended that the deed should not operate until something else occurred. There is therefore nothing on which to build the semblance of an argument that the deed was an escrow.

Secondly, it is said that this was a bill of sale within the Bills of Sale Act, and not being registered within twenty-one days was void as against an execution creditor. But supposing it to be within that act, it is likewise within the exception in the act (s. 7) of assignments made for the benefit of creditors. On the face of it, it is a fair and honest deed, it is made by a debtor who knows that all his property is about to be seized and swept away by a single creditor, leaving perhaps every other creditor without a shilling of his debt, and who, instead of permitting this to be done, executes an assignment to a trustee on the terms that after payment of expenses the money realized shall be applied in payment of the composition of two shillings in the pound which is secured by the covenant of himself and his surety the plaintiff. How can we say that this deed, which has the effect of taking the property out of the hands of one creditor, and applying it in part satisfaction of all, is not for the benefit of the creditors in general?

Thirdly, it is said that the deed is fraudulent and void, because while it appears to transfer the debtor's whole estate to a trustee for creditors, there is in fact an ultimate trust for himself. But it is not to be forgotten that the creditors obtain the benefit of the personal covenant of the surety, who is not to be supposed to be insolvent. No fraud is necessarily to be inferred in a deed of this nature. As was said by Martin, B., in *Symons* v. *George* (1), a man has primâ facie an entire right to part with his property. Fraud may invalidate his act, but fraud must be proved. We have here apt words, and a fit mode of conveyance, passing the property in due form to a trustee, and with nothing illegal appearing either on the face of it, or otherwise, which may defeat its operation. Circumstances might no doubt exist making it proper to leave to the jury the question whether the deed was a fair and

(1) 3 H. & C. at p. 73; 33 L. J. (Ex.) at p. 233.

bonâ fide deed, or a fraudulent conveyance; but it is enough to say that no evidence was given of such circumstances, and that no such question was in fact put to the jury. This rule must therefore be discharged.

CLEASBY, B. I am of the same opinion. I give no opinion upon the sufficiency of this assent in point of authority, but I should hesitate long before coming to the conclusion that an authority to assent could be duly exercised in the manner appearing in this case. But it is not necessary to say anything further on that point, because the assent itself was clearly insufficient and inoperative. The idea of equality is at the foundation of these deeds of arrangement; they must put all creditors upon an equal footing. The case of *Ex parte Rawlings* (1), where an assent was rejected which was given on the condition that all the creditors were unanimous, shews that an assent in any degree qualified in its terms is not valid. There, however, no advantage was stipulated for. But how can it be said that where a deed is assented to in the present form, all the creditors are in the same position? Some assent absolutely, others without prejudice to their rights under a former deed. It is clear that so far the idea of equality is gone, and the deed, therefore, cannot be good under s. 192 of the Bankruptcy Act, 1861.

We must, therefore, consider whether the deed is valid as a conveyance of property at common law. To make it invalid it must be shewn either that it is illegal or that it is an escrow. Now there is nothing illegal in a debtor conveying all his property to a trustee for the benefit of his creditors, although his doing so may be an act of bankruptcy. Clearly there is no fraud in it. And if so there is no illegality in the deed. It has, indeed, been argued that this is a bill of sale, and that not being registered under the Bills of Sale Act it was void as against an execution creditor. But the Chief Baron's observation on that is conclusive, that if it is within the act it is also within the exception. Then, is it an escrow? There is no extrinsic evidence of the fact, and, as my Lord has pointed out, the probabilities are against it. But it is said that being intended to operate under s. 192, its operativeness

(1) 1 D. J. & S. 225, 235, 253; 32 L. J. (Bkcy.) 27, 31.

1869

JOHNSON v. OSENTON.

is dependent on the event of its validity under that section, and that it therefore has not conveyed the property to Johnson. But suppose a creditor sued Johnson upon the covenant to pay a composition of 2*s.* in the pound, could he set up in answer that the deed was only intended to operate under s. 192, and that as it could not do so his covenant was of no effect? Clearly he could not. And if so, can it be supposed that the conveyance of the property, which is not any more than the covenant limited by any conditions as to the validity of the deed under s. 192, would not be equally valid with that covenant, and that if on execution being sued out against Johnson nothing were realized, the creditors could have no resort to the property which was assigned to him on trust for them? Certainly not. As there is nothing to prevent the liability from attaching, so there is nothing to prevent the conveyance from having its effect. If, indeed, the words, saying that the deed was intended to operate under the act, could be construed as meaning that unless it were duly assented to and registered it should be null and void, everything would be got rid of. But no such thing is expressed. The words mean only to give notice that the deed is intended to be for the benefit of all creditors, and to have all the effect given to it which it can derive from a compliance with the conditions of the Bankruptcy Act, 1861. This is very different from saying that it shall have no effect unless that intention be carried out; and in giving this construction to the words, we are acting in harmony with an unreported decision of the Common Pleas, in a case in which I was counsel, where a deed in this form having been set up as a defence to an action, the court refused to grant me a rule to enter the verdict for the plaintiff, which was moved for on the ground now relied on by the defendant in this action.

Rule discharged.

Attorney for plaintiff: *Bishop.*
Attorneys for defendant: *H. C. Nisbet & Co.*

[IN THE EXCHEQUER CHAMBER.]

1869
Feb. 9.

SINER AND WIFE *v.* THE GREAT WESTERN RAILWAY COMPANY.

Negligence—Railway Company—Train too long for platform.

An excursion train, in which the plaintiffs (husband and wife) were passengers to Rhyl, arrived at Rhyl station and, the train being too long for the platform, the carriage in which they were overshot it. It was then daylight. The passengers were not warned to keep their seats, nor was any offer made to back the train to the platform; nor was it in fact so backed; nor did it move until it started for Bangor. After waiting a short time the husband, following the example of other passengers, alighted, without any request to the defendants' servants to back the train or any communication with them. The wife, standing on the iron step of the carriage, took both his hands and jumped down, and in doing so strained her knee. There was a footboard between the iron step and the ground which she did not use, but there was no evidence of any carelessness or awkwardness on her part in the manner of descent. In an action brought for the injury:—

Held (per Byles, Mellor, Montague Smith, and Hannen, JJ., Keating, J., dissenting), affirming the decision of the Court below, that there was no evidence for the jury of negligence in the defendants, and that the accident was entirely the result of the plaintiffs' own acts.

Foy v. *London, Brighton, and South Coast Railway Company* (18 C. B. (N.S.) 225), commented on.

APPEAL from a decision of the Court of Exchequer, making absolute a rule to enter a nonsuit.

The action was by a husband and wife, and the declaration was as follows:—

First count, that the wife was received by the defendants as a passenger, to be carried from West Bromwich to Rhyl, on the terms that defendants should use due care in and about carrying her, &c., and should at Rhyl station use due care in and about affording her reasonable facilities for alighting from the carriage in which she should be carried; that the defendants carried her to Rhyl, &c., yet they did not at Rhyl station use due care in and about affording her reasonable and proper facilities to alight, by reason whereof, she, in alighting from the said carriage, strained one of her legs, &c.

Second count, claiming damages by the husband for loss of his wife's society, &c.

Pleas: 1. Not guilty. 2. That the wife was not a passenger. Issue.

The case was tried at the Shrewsbury spring assizes, 1868, before

1869

SINER v. GREAT WESTERN RAILWAY CO.

Keating, J. The facts were as follows:—The plaintiffs travelled by an excursion train on the defendants' line from West Bromwich to Rhyl, and arrived there in daylight. At Rhyl, the train was too long for the platform, and the engine with the few front carriages overshot it. The plaintiffs were in one of these carriages, and their only way of alighting at the place where their carriage stood was, either by jumping from the iron step to the ground (a distance of about three feet), or stepping from the iron step to the horizontal board which runs along the carriage about half way between the step and the ground, and thence to the ground; the place they swore was awkward and dangerous. The passengers were not told to keep their seats, and the train never in fact backed into the station, nor moved at all until it started for Bangor. No porters were in sight; several persons got out of the carriage, and the husband then, without any communication with the defendants' servants, and without any request to them to back, himself alighted. His wife, standing on the iron step, took both his hands as he stood below her, and jumped down, and in so doing strained her knee.

The learned judge ruled that there was evidence to go to the jury that the company intended the passengers in the carriages beyond the platform to get out at that place; he laid down that the defendants were bound to provide reasonable and proper means for passengers to get out, and he left to them the questions, whether reasonable and proper means for alighting were provided by the defendants, and whether, under all the circumstances, it was a reasonable and proper thing for the plaintiffs to get out of the carriage in the way they did.

The jury found a verdict generally for the plaintiffs, for 300*l*., leave being reserved to the defendants to move to enter a nonsuit or a verdict for them, on the ground that there was no evidence of negligence to go to the jury. A rule was obtained accordingly, which was afterwards made absolute by the Court of Exchequer (per Martin, Bramwell, and Pigott, BB., Kelly, C.B., dissenting). (1) Against this decision the plaintiffs appealed.

Jelf (*J. O. Griffits* with him), for the plaintiffs, relied chiefly

(1) Law Rep. 3 Ex. 150.

1869

SINER v. GREAT WESTERN RAILWAY CO.

on the authority of *Foy* v. *London, Brighton and South Coast Railway Company.* (1)

Powell, Q.C. (*McIntyre* and *Mangles* with him), for the defendants, relied on *Harrold* v. *Great Western Railway Company.* (2)

The following cases were also referred to in the course of the argument: *Toomey* v. *London, Brighton, and South Coast Railway Company* (3); *Crafter* v. *Metropolitan Railway Company* (4); *Stubley* v. *London and North Western Railway Company* (5); *James* v. *Great Western Railway Company* (6); *Fordham* v. *London, Brighton, and South Coast Railway Company.* (7)

BYLES, J. I have entertained considerable doubt in this case; but after the best deliberation I can give to the matter, I think the judgment of the Court of Exchequer ought to be affirmed; and the ground of my decision is that the proximate cause of the accident was the female plaintiff's own act. It was not shewn that what she did was necessary. There was no evidence to prove that if she had remained in the carriage, the train would not have been backed. In fact it was not backed, because all the passengers for Rhyl in the front carriages seem to have got out, and there was no occasion to do so. But we have not any reason to suppose that, if the plaintiffs had called out and expressed a desire to descend on to the platform, the train would not have been backed in compliance with their request. On this ground, therefore, namely, that the accident was caused by the female plaintiff's own act, and not by the company's negligence, I am of opinion that the judgment should be affirmed.

KEATING, J. I retain the impression which I had at the trial of this case, and I think the judgment of the Court below ought to be reversed. I need hardly say that I express this opinion with great hesitation, opposed as it is to that of the majority of my learned brethren. But it is satisfactory to know that it is in accordance with that of the Lord Chief Baron, and to remember that in most of these cases the line between what ought and what

(1) 18 C. B. (N.S.) 225.
(2) 14 L. T. (N.S.) 440.
(3) 3 C. B. (N.S.) 146.
(4) Law Rep. 1 C. P. 300.
(5) Law Rep. 1 Ex. 13.
(6) Law Rep. 2 C. P. 634, (n.)
(7) Law Rep. 3 C. P. 368.

1869

SINER v. GREAT WESTERN RAILWAY CO.

ought not to be left to the jury is very difficult to draw. Here, I think, I was right in leaving the question to them. The declaration charges the defendants with negligence, in not using due care in and about affording the female plaintiff "reasonable and proper facilities to alight" at the Rhyl station; and the first question is, whether there was evidence that no proper facilities were afforded; and in considering this question I will avoid, as far as possible, importing anything into the case from the common knowledge which we all possess on the subject, and confine myself to what was proved at the trial. It appears that on this occasion the front carriages of the train, in one of which were the plaintiffs, went beyond the Rhyl station. It does not appear what the length of the station was, but it was not disputed at the trial that the train was longer than the platform. Now, while I agree that it would be unreasonable to expect that every station on a line should be made long enough to hold at its platform any train, even if of an exceptional length, still if the station is not long enough, then, inasmuch as railway carriages of ordinary construction, such as we may take the one in which these plaintiffs travelled to have been, are made to come to station-platforms for passengers to get out, it is not, in my opinion, unreasonable to hold that if by the accident of excessive length a train overshoots a station, the railway company should take some precautions either to ensure facilities to the passengers to alight, or else to inform them that after an interval the train will back into the station. In this case, the company did neither the one nor the other. There were no special facilities afforded, and no notice that any change of position was intended. This being so, the plaintiffs, after in vain looking for a porter, and finding the time was running on, and that some of their fellow-passengers had descended safely, resolved to follow their example. [The learned judge then read the evidence as to the accident, and proceeded as follows]:— If the company by these arrangements be held to have provided reasonable and convenient facilities for the passengers to get out, there is an end of the case. The learned judges of the Court below, however, seem to base their judgments upon this, that, even supposing the arrangements were unreasonable and inconvenient, still the accident was entirely the female plaintiff's own fault. With regard to the question of the reasonableness of

the means of descent provided, I am of opinion that there was at least evidence for the jury that those means were unreasonable. The case on this point appears practically identical with *Foy* v. *London, Brighton, and South Coast Railway Company* (1), and the observation of one of the learned Barons (Bramwell, B.) in this case that the witnesses who spoke to the place being dangerous were not "experts" (2), would equally apply there.

Secondly, supposing the place not to have been a reasonably convenient one, no doubt the plaintiff cannot complain if the accident was really her own fault. But the evidence is that she got out carefully. Perhaps she might have done so more cleverly, but when we speak of contributory negligence, we do not mean to say that it exists because extraordinary skill has not been used. Again it is said (2) that she ought to have stayed in the carriage, and there is certainly some difficulty on this point. But the question whether it would be right to stay or not must really always be one of degree. A man who should quit a train which is on the brink of a precipice or the border of a canal, would, of course, have to take the consequences of his rashness. On the other hand, the attempt to get out may be made, as I think it was here, under circumstances which entirely remove it from the category of cases referred to in the Court below (3); for here other passengers had been seen to alight in safety, so that there was no obvious imprudence in the attempt. Was the plaintiff, under these circumstances, bound to stop where she was and be taken on to the next station? I do not think that the company had any right to put the alternative to her either of risking danger in jumping out or of being taken to a place beyond her destination; and on this part of the case I entirely concur with the remarks of the Lord Chief Baron. (4)

Lastly, it is said that the plaintiffs ought to have waited until the train could have been backed into the station, and I agree that perhaps they ought, had there been any likelihood of their being able to insist on that course being taken. There were no porters near, however, and there was no suggestion that the company had any intention themselves of ordering the train to be backed. At

(1) 18 C. B. (N.S.) 225.
(2) Law Rep. 3 Ex. at p. 153.
(3) Law Rep. 3 Ex. at p. 154.
(4) Law Rep. 3 Ex. at p. 156.

1869

SINER v. GREAT WESTERN RAILWAY CO.

any rate, this was a question for the jury to determine, looking at all the circumstances.

Upon the whole, therefore, I am of opinion that the judgment of the Court below should be reversed. The case of *Foy* v. *London, Brighton, and South Coast Railway* (1) is, no doubt, distinguishable on one point, viz., that there a porter suggested the alighting to the person injured, whilst here there was no direct invitation. But on the main question whether the case ought to have gone to the jury or not, the two cases appear to me to be identical.

MELLOR, J. I am of opinion that the judgment of the Court below ought to be affirmed. It is conceded that the place where the accident occurred was not dangerous otherwise than because it was beyond the station-platform. The husband, it is true, says the place was awkward and dangerous, but that may be understood in the sense of there being less accommodation there than in the station itself. The carriage was an ordinary railway carriage, properly constructed, and the only ground of negligence that I can see capable of being charged against the company is, that they did not afford to the plaintiffs as much convenience for alighting as they might have done. Now I asked during the argument, what precautions the defendants ought to have adopted, and the difficulty which was felt in answering that question satisfactorily is strong evidence, to my mind, to shew that in adopting no special precautions the defendants were not guilty of any negligence; and I do not think there was any, though I should have taken the same course as my Brother Keating, and left the matter to the jury in order, in case I was wrong, to avoid the necessity of a second trial. The mere fact of the carriage, in which the plaintiffs were, being beyond the end of the platform, proves no more than that there was less safety than otherwise there would have been; but it is notorious that the exigencies of traffic must sometimes require trains of such length as to go beyond the limits of an ordinary station-platform. Again, the defendants might have been requested to back the train, but there is no evidence that any such request was made or intended to be made. The evidence seems to me to establish not negligence but only a less degree of convenience than is usual, and for that

(1) 18 C. B. (N.S.) 225.

1869

SINES v. GREAT WESTERN RAILWAY CO.

the defendants are not responsible. I should add that I agree with my Brother Keating that the company were not entitled to put the alternative to the plaintiffs of either being carried on in the train or of descending at a risk. They are bound to provide reasonable accommodation for their passengers to alight, and it is no sufficient excuse to them for not doing so, that the passengers might remain with safety in the carriages and be carried on to a station beyond their destination. But, as will be gathered from what I have already said, I do not think that in the present case that alternative was presented to the plaintiffs.

MONTAGUE SMITH, J. I think that the judgment of the Court below ought to be affirmed. There was, in my opinion, no evidence that the injury complained of was owing to the defendants' negligence. On the contrary, there was evidence that it was caused by the female plaintiff's own act. She chose to jump from the carriage, and if that jump was imprudent she herself was the cause of the injury she received. In determining such a question as the present, judges cannot denude themselves of that knowledge of the incidents of railway travelling which is common to us all. Now, applying that knowledge to the facts proved, I cannot see any evidence of negligence here. The station was not shewn to be improper for ordinary traffic, nor to be badly constructed, nor was the train brought up to it in a negligent manner. But the plaintiffs, without calling for assistance or desiring the servants of the company to back the train, resolved to alight, and the female plaintiff jumped down with her husband's help. The train could not have backed until a sufficient time had elapsed for the passengers in that part of it which was at the platform to get out, and eventually it became unnecessary to back at all, because it seems that all the passengers in the front carriages, for whose convenience the backing might have taken place, got out at the place where the train was first brought to rest. Were the defendants bound to provide special precautions for these passengers, amongst whom were the plaintiffs? I do not see that they were, or that they were negligent in omitting to do so. No requisition of any kind was made to them, either for steps or otherwise, in order to facilitate the descent of the passengers, and no direct invitation to descend was given.

1869

SINER v. GREAT WESTERN RAILWAY CO.

But, even assuming there was negligence on the part of the defendants, I think there is clear evidence that the cause of the injury was not that negligence but the plaintiff's own voluntary act. She acted on her own opinion of her own activity. With regard to *Foy* v. *London, Brighton, and South Coast Railway Company* (1), it is in some respects very like this case. But there the plaintiff was expressly invited to alight, and on that ground the Court below, I think, rightly held it to be distinguishable. On the other hand, *Harrold* v. *Great Western Railway Company* (2), is still more like the present, the only difference between the two being that there the plaintiff jumped down in the dark, whilst here it was daylight.

As to the question which has been mooted whether the company are entitled to put a passenger to the alternative of peril in descent or of being carried on in the train, that seems to me to be necessarily one of degree. If the descent would obviously be imprudent and dangerous, then, as my Brother Keating has said, it ought not to be made, and if made and injury ensues, the person making it must take the consequences. But whether a passenger would be justified in alighting, or be bound to stay where he was, must depend on the circumstances of each particular case. I wish to add that I think my Brother Keating took the right course at the trial in taking the opinion of the jury, reserving leave to the defendants to move. By this means the possible inconvenience of a second trial has been avoided.

HANNEN, J. I am of opinion that the judgment of the Court below should be affirmed. I think juries take an exaggerated view of the duties of railway companies. The companies have done so much for the comfort and convenience of travellers, that it is now made the subject of complaint if the highest degree of luxurious care is not attained in all their arrangements. Platforms are now made so that passengers may step from the carriage to the ground with as great ease as they can pass from one room of their house to another. And this is so usual that I do not doubt that it would be negligence to bring a train to a stop in such circumstances as would lead a person to expect that there was a plat-

(1) 18 C. B. (N.S.) 225. (2) 14 L. T. (N.S.) 440.

form. But if it is daylight, and the passenger can see that there is no platform, then he must inquire whether there are not other means of alighting. Now here the lady chose to jump, and that was the immediate cause of the accident. Why did she jump? If she had no other means, after doing her best to obtain them, I think she might. But here there were other means, which are not shewn to have been improper. Indeed, upon the assumption that the carriage was an ordinary one, I should say there were sufficient means, although not so convenient as a platform. Other people got down without injury. It is true the female plaintiff said she could not. But she does not say why she could not. Suppose she had said so of an ordinary platform. This bare assertion would not be enough; and applying the common knowledge we all have as to the construction of carriages, I think it lay upon the plaintiffs to shew more special reason why it was dangerous or impossible to use the footboard, so as to make it negligent on the part of the company not to provide some other means of alighting. No such evidence having been given, I think the plaintiffs should have been nonsuited.

If *Foy* v. *London, Brighton, and South Coast Railway Company* (1) be in conflict with this decision, I think that case was incorrect; but sitting in a court of error I feel free from its authority.

BYLES, J. I desire to say that in my Brother Keating's position I should have taken the same course as he did. I should have taken the opinion of the jury and reserved the point.

Judgment affirmed.

Attorneys for plaintiffs: *Field & Co., for Rankin, West Bromwich.*

Attorneys for defendants: *J. Blenkinsop.*

(1) 18 C. B. (N.S.) 225.

1869
Jan. 20.

COURTAULD *v.* LEGH.

Easements—Light and Air—Prescription Act (2 & 3 *Wm.* 4, *c.* 71), *s.* 3—*Actual Enjoyment—Unfinished House.*

14 CLD 216

To acquire a right to the access of light and air by *actual enjoyment*, under 2 & 3 Wm. 4, c. 71, s. 3, it is not necessary that the house should be occupied, or that it should be fit for immediate occupation during the statutory period.

A house was structurally completed, the roof finished, the floors laid, and the windows put in, but it was not internally completed nor fit for habitation. It so remained till within a period of twenty years before action, and was then finished:—

Held, that the owner was entitled to maintain an action for the obstruction of its windows.

SCar amn pl post 187

Special case stated in an action for the obstruction of light.

The plaintiff and defendant were owners of adjoining houses (Nos. 15 and 17) in Lewes Crescent, Brighton. No. 15, being then in course of erection, was conveyed to Thomas Goodall in the year 1829. After his purchase, Goodall continued the building of the house, and, in the following year, completed the structural portions of it, finished the roof, laid the floors, and put in the windows, but he did not complete the internal fittings, nor paint, paper, nor decorate the house, and, in the state in which it then was, it was not fit for habitation. The house remained in this condition until, in 1852, the plaintiff purchased it, and, before the end of the following year, completely finished it, and went to reside there with his family. The plaintiff occupied the house for two years, but, at the end of 1855, ceased to reside there, and the house has remained ever since unlet, in the charge of a housekeeper.

In August and September, 1865, the defendant, the owner of No. 17, built a room at the back of his house, which caused the obstruction in question. (1)

The question for the opinion of the Court was, whether the plaintiff was entitled, as against the defendant, to the flow of light and air to his house.

(1) The case contained other statements intended to show that the defendant was bound by certain covenants not to build, entered into by his predecessor in title, with the common owner of the two houses, after the conveyance of No. 15 by the latter to Goodall; but no decision was pronounced on this part of the case.

1869

COURTAULD v. LEGH.

Garth, Q.C. (*Thesiger* with him), for the plaintiff. A beneficial use of the light by the owner of the house is not necessary to actual enjoyment, under 2 & 3 Wm. 4, c. 71, s. 3, but the owner of the privileged windows is entitled to protection in respect of the whole quantity of light that has entered his premises, without regard to the use he has put it to, or the necessities of his previous occupation: *Yates* v. *Jack.* (1) Actual occupation is not necessary to entitle him to complain: *Wilson* v. *Townend* (2); and the enjoyment by which the right is acquired is not different from that enjoyment the disturbance of which so entitles him. He also referred to *Calcraft* v. *Thompson* (3), and *Tapling* v. *Jones.* (4)

THE COURT called upon

Pollock, Q.C. (*Thrupp* with him), for the defendant. The right to light and air arises out of, and depends upon, occupancy: *Moore* v. *Rawson* (5); and the extent of the right acquired depends upon the use: *Martin* v. *Goble.* (6) It follows, therefore, that there must be, if not an actual occupation, at least such a state of circumstances as admits of occupancy. The house must be habitable, even if it be only so far habitable as to admit of the residence of a housekeeper; but in the present case it is found, as a fact, that it was unfit for habitation until the plaintiff finished it in 1853, within twenty years of the action. The existence of windows in a house in that condition gives no actual enjoyment, but is only notice of an intention to enjoy.

KELLY, C.B. I am of opinion that the plaintiff is entitled to our judgment. It has been contended, that to acquire a right to light under the statute, there must be an actual enjoyment, founded on, or connected with, occupation of the premises, though it is not denied that an occupation by a mere housekeeper would be sufficient. But I am of opinion that no occupation at all, in the sense of personal occupation, is necessary to constitute actual enjoyment within the meaning of the statute. It appears that this house was completed as to its external and internal walls, the roof, and the flooring, and that windows had been put in,

(1) Law Rep. 1 Ch. 295. 12 Jur. N.S. 305
(2) 30 L. J. (Ch.) 25.
(3) 15 W. R. 387.
(4) 11 H. L. C. 290; 34 L. J. (C.P.) 342. 11 Jur. N.S. 309
(5) 3 B. & C. 332.
(6) 1 Camp. at p. 323.

(2) 1 De G. Sm. 324. 6 Jur. N.S. 1109

1869

COURTAULD v. LEGH.

capable (as we may suppose) of being opened and shut, and of admitting light. When a house is in that condition, it may properly be said that the owner enjoys the use and access of light to it, and such enjoyment is sufficient to give a prescriptive title under the act. It not unfrequently happens that houses are entirely finished with the exception of their internal decorations, with the intention that they shall be let in that state, and that the decorations may be completed according to the taste of the tenant. Can it be said that in such a case, whilst the house remained unlet, the use of the light was not an enjoyment by the owner, and that the access of light and air, which is absolutely necessary to defend the house against dry rot and other mischiefs likely to happen to untenanted houses, can be secured only by an actual personal occupation of the house? I have no hesitation in saying that occupation is quite an immaterial circumstance. The case of *Martin* v. *Goble* (1) goes only to shew that, if the nature and purpose of the building be changed, the owner can still only claim that quantity and degree of light which he actually enjoyed before. If he had occupied it for ten years as a malt-house, and for ten years as a dwelling house, admitting and using a larger quantity of light, the quantity he can claim for is only the quantity, whatever it may be, which has in fact passed in through the windows during the whole period of twenty years. But whatever quantity has passed into this house, that quantity was used and enjoyed by means of the windows. The plaintiff has, therefore, a good title to the enjoyment of his windows free from obstruction.

CHANNELL, B. I am of the same opinion. The only question before us is whether, under the statute, the plaintiff has acquired a right to the light which has entered through the windows of his house during the last twenty years. I agree that the question is an important one, but it is one not difficult of solution. We have no power to draw inferences of fact, nor do I claim to do so; but we are entitled to assume, on this statement of facts, that the windows were ordinary windows, capable of admitting light. The defendant contends that, where the statute, in s. 3, says that there must be an actual enjoyment, it means by those words to require

(1) 1 Camp. at p. 323.

a personal occupation. The words "enjoyed therewith" show that there must be such a corporeal hereditament as that before mentioned ("dwelling house, workshop, or other building"), and it is said that there could not be an enjoyment unless there was an actual occupation according to the nature of the premises in question. Now the act does not refer to any particular mode of enjoyment, and, without any straining of its language, we may hold that, where a house exists with ordinary windows (not, for instance, windows with iron shutters fixed behind them), through which light and air have passed in fact, the words of the statute are quite satisfied, and it is no objection that, for some purposes, the house is not beneficially occupied. This view entirely meets the justice of the case, for there could be no mistake as to the use which was to be made of the windows; it was no mere intention floating in the mind of the owner, but an intention unmistakeably indicated.

PIGOTT, B. The facts show that this house was structurally complete, and in this respect only not fit for use, that it was not finished in point of decoration. It was, nevertheless, a dwelling house, and the light entering at its windows was actually enjoyed therewith. The house, like any other property, was enjoyed by virtue of the ownership. In the same way that the owner enjoyed the house he enjoyed the windows which were opened in it, and the light which passed through them. Suppose the house had been actually finished and advertised to let, and so remained empty for twenty years, could it be said that the owner, during that time, did not so enjoy the light as to acquire a right to its continuance? Certainly it could not. He did not desire to occupy the house himself, but he desired to enjoy it as owner, and he did so enjoy it; with it he enjoyed the light, and that access of light through the windows gave the house a value in the market. The statute does not in terms require an actual occupation, nor can its necessity be inferred from the words used.

CLEASBY, B. I am of the same opinion. There has been an enjoyment for the requisite period, for at the time when the owner finished the frame of the house, and put in windows admitting light, he commenced to enjoy the light. He clearly indicated the purpose for which the windows were put in, and in

1869

COURTAULD v. LEGH.

accordance with that purpose, the light did enter them, and was actually enjoyed by him. The fallacy of the defendant's argument lies in assuming that, for actual enjoyment of light, the party having it must take all the benefit which he could derive from its use. As far as the defendant is concerned, who is the person to be bound, the enjoyment was as complete as it could be, and whether his neighbour was in actual occupation or not was quite immaterial to him.

The phrase "actually enjoyed" is also used in s. 2 of the act, in reference to the acquisition of rights of water and certain other easements; and it is a sound rule of construction to give the same meaning to the same words occurring in different parts of an act of parliament or other document. Now, those words, as regards water rights, are, no doubt, not satisfied without an actual use of the water. It would not be enough to construct a well and water-wheel upon a stream; the period would not begin to run until there was an actual appropriation and use of the water. (1) This appears to favour the defendant's argument. But, independent of the right to light being placed upon a different footing from other rights (forming, as it does, by itself the subject of s. 3) in the case of water, the question would not be how far a beneficial use had been made of it, but whether it had been made available for the purpose. So here the actual enjoyment is taken by the entering of the light into the windows, whether the owner has derived any personal or pecuniary benefit from its use or not.

As regards the case of *Martin* v. *Goble* (2), it is a Nisi Prius case, and was decided before the Prescription Act, upon which the right is now founded; and, so far as it decides that the right of light passing through a certain window is limited by the use which has been made of it, is wholly inconsistent with the judgment of the House of Lords in *Jones* v. *Tapling*. (3)

Judgment for the plaintiff.

Attorneys for plaintiff: *Wilde, Humphrey, & Co.*
Attorneys for defendant: *Hathaway & Andrews.*

(1) See *Sampson* v. *Hoddinot*, 1 C. B. (N.S.) 590, at p. 611; 26 L. J. (C.P.) 148, at p. 150.

(2) 1 Camp. at p. 323.

(3) 11 H. L. C. 290; 34 L. J. (C.P.) 342.

GILPIN *v.* COHEN AND BENJAMIN.

1869
Jan. 27.

Privilege from Arrest—Accused Person appearing on his Recognizances at the Hearing of the Charge against himself.

An accused person, who attends under his recognizances at the hearing of the charge against himself, is privileged from arrest on civil process during his return home.

The defendant was charged with embezzlement before a police magistrate; after several hearings he was remanded on bail; he afterwards attended at a further hearing on his recognizances, and as he was leaving Court after a further remand he was arrested on a ca. sa. at the suit of the plaintiff:—

Held, that he was entitled to be discharged.

Semble, any person whose presence is necessary to the administration of public justice, and on whose will it depends whether he shall or shall not attend, is privileged from arrest on civil process, eundo, morando, et redeundo.

Hare v. *Hyde* (16 Q.B. 394; 20 L. J. (Q.B.) 185), distinguished.

DURING the pendency of this action, the defendant Benjamin was charged at the Worship Street Police Court by his partner Cohen, under 31 & 32 Vict. c. 116, s. 1, for misappropriation of partnership moneys. After several hearings he was admitted to bail, and afterwards, while still on bail, he attended other hearings of the charge on his recognizances. As he was leaving the Court after thus attending a hearing on the 23rd of January, the case having been then again adjourned, he was arrested on a writ of ca. sa. issued at the suit of the plaintiff, who had recovered judgment in the action.

Jan. 26. *Besley* moved for a rule to discharge Benjamin out of custody. Benjamin was entitled to privilege by the general rule that secures freedom from arrest on civil process to all persons who are necessary parties to the administration of public justice, whilst they are engaged in the performance of their duty. The public character with which they are clothed protects them, and good faith requires that when they are called upon to discharge a public duty, and drawn from their homes for that purpose, the public force should not be put at the disposal of a private person to their prejudice. The general rule is not denied, and it applies to witnesses, to jurymen, and to prosecutors. If, therefore, the privilege is denied to the defendant, it must be denied by way of

1869

GILPIN v. COHEN.

exception to a general rule, and the exception must be grounded either on the nature of the inquiry, or on the position occupied in it by Benjamin, or on the fact that he was not actually engaged in the discharge of his duty of attendance at the time of the arrest. But, as to the first ground, the case of *Montague* v. *Harrison* (1), where one attending as prosecutor and witness, on a preliminary inquiry before a police magistrate after a remand, was held privileged on his way home, shews that such an inquiry is one to which the privilege is annexed; and in *Ex parte Cobbett* (2) Crompton, J., says, "However inferior the tribunal may be, if it be a lawful tribunal, the privilege on principle exists." Secondly, the fact that Benjamin was a party to the proceeding, as accused and not as prosecutor, does not give less but more reason why he should be protected; for the participation of the accused in his own trial is not volunteered but compulsory. If he is innocent, the hardship is the greater, and his claim to protection more urgent; if he is guilty, the inducement to neglect his duty is the stronger, and there is the more need that other deterrent circumstances should be removed out of his way; if neither is to be presumed, he is at least on an equal footing with the prosecutor, and his title to the privilege the same. No English case can be cited directly upon the point; for *Goodwin* v. *Lordon* (3) is distinguishable. There the prisoner had been committed for trial, and was afterwards acquitted, and was arrested on his way home after the acquittal; in the first place, therefore, the proceeding was at an end, which is not the case here; but in the second place it had not depended on the prisoner's will whether he should attend or not. The case is therefore explained by *Ex parte Cobbett* (4), where it was held that the privilege eundo, morando, et redeundo was an undivided thing, and if one part could not be claimed neither could the other. In *Goodwin* v. *Lordon* (3) the prisoner was so far from being entitled to any privilege from arrest eundo, that a writ could have been lodged with the sheriff for his detainer whilst he was in custody awaiting his trial; he therefore could not claim it redeundo. And, on the other hand, the con-

(1) 3 C. B. (N.S.) 292; 27 L. J. (C.P.) 24.

(2) 7 E. & B. at p. 959; 26 L. J. (Q.B.) 293.

(3) 1 A. & E. 378.

(4) 7 E. & B. 955; 26 L. J. (Q.B.) 293.

clusion against the privilege, based on the assumption that the decision turned on the position occupied by the prisoner as a person accused, is opposed to the decision in *Callans* v. *Sherry* (1), where the distinction was drawn between the case of one in custody and one out on bail, and in the latter case one who was acquitted after appearing on his recognizances to take his trial was held privileged from arrest on his way home. Thirdly, the two cases last cited also clearly shew that this privilege cannot be limited, in the case of an accused person any more than in the case of prosecutors or witnesses, to the coming to Court, but must extend also to the return. He also cited *In re M'Kone* (2), *Rex* v. *Wigley* (3), and Taylor on Evidence, vol. 2, 4th ed. pp. 1126—1132.

Baylis shewed cause in the first instance. No English case has been cited which extends the privilege to accused persons. In *Anon.* (4), one of the first cases in which the right of an acquitted prisoner to privilege was raised, the case of *Rex* v. *Priddle* (5) is relied on against the privilege, and Parke, J., who had already on the argument expressed an adverse opinion, afterwards (6) said in the presence of Lord Tenterden, C.J., and Taunton and Patteson, JJ., that he had consulted the other judges and examined the authorities, and that they were of opinion that no such privilege from arrest where a defendant had been discharged from lawful custody existed. This is stated quite generally, and the decision is one of very high authority; and it is confirmed by *Jacobs* v. *Jacobs* (7), where Parke, B., treats the point as expressly decided, and by *Goodwin* v. *Lordon.* (8) Lastly, in *Hare* v. *Hyde* (9) these cases are followed, and the Irish decisions to the contrary noticed and expressly overruled.

Besley, in support of the rule. *Rex* v. *Priddle* (5) was decided on the ground that there was too great delay in returning home. With respect to all the cases cited on the other side, it appears that the accused person came up in custody. They therefore leave the Irish decisions untouched; and even in *Hare* v. *Hyde* (9) Lord Campbell

(1) Alc. & Nap. 125.
(2) Ir. Circ. Rep. 65.
(3) 7 C. & P. 4.
(4) 1 Dowl. 157.
(5) Tidd's Pract. vol. i. p. 196 (9th ed.)
(6) 1 Dowl. at p. 158.
(7) 3 Dowl. 675, 676.
(8) 1 A. & E. 378.
(9) 16 Q. B. 394; 20 L. J. (Q.B.) 185.

1869

GILPIN v. COHEN.

says, "If the defendant were within a part of the privilege, we should, no doubt, think him entitled to the entire privilege, and summarily discharge him;" agreeing in this with *Ex parte Cobbett.* (1) It appears, therefore, that if the prisoner there had appeared on his recognizances, as was the case here, as he would certainly have been privileged in coming, he would also have been held privileged in his return; so that the decision in fact favours the defendant's case. The plaintiff's argument is purely negative, and, without any reason, seeks to introduce an exception to a general rule, the effect of which may be to put a wrongfully accused person, whose pecuniary difficulties have perhaps been caused by the wrongful charge itself, in a worse position than his wrongful accuser.

Cur. adv. vult.

Jan. 27. KELLY, C.B. In this case a question arises of very considerable importance, and, so far as I know, arises now for the first time in a court of law in this country. That question is, whether one who is charged with a crime before a police magistrate is privileged from arrest under civil process on his way from the court to his own home, after the adjournment of the case. I am of opinion that the privilege does exist, and that the defendant Benjamin is entitled to be discharged. Various authorities were cited before us, but none directly in point. The privilege no doubt exists in all cases, whether civil or criminal, in respect of witnesses, jurymen, and prosecutors; but it has not yet (at least in this country) been held to exist in favour of those who are the objects of a criminal prosecution. We must consider therefore the principle on which this privilege is, in other cases, admitted and recognised. It cannot be said that it is necessarily connected with the question whether a contempt of court has been committed. No doubt it would be a contempt of court to obstruct the administration of justice by arresting a witness on his way from one part of the court to another; but in the present, as in many cases, the act is done innocently and perhaps unconsciously: whilst the privileged person is on his way to court to give evidence, or, having given evidence, is returning to his own home. We had better, therefore, consider the case quite apart

1) 7 E. & B. 955; 26 L. J. (Q.B.) 293.

from the doctrine of contempt; and the question then arises, on what ground does this privilege exist? It appears to me it must be considered in a double point of view: first and principally, as respects the administration of justice; and, secondly, as respects the party himself who claims the privilege.

Now, as regards the administration of justice, it is admitted that this privilege exists in favour of all other persons who are to take a part in the proceedings of the case, whether civil or criminal, whether as witnesses, parties, or jurymen. Why then should not the privilege extend to one who is a party to proceedings in which he is accused of a crime, and who is out on bail after the proceedings have commenced against him? Why do not the same reasons apply to him? He is under an equal obligation with that imposed on the witnesses, the jury, and the prosecutor; he is bound in duty and good faith to those who have become his bail, but is under a still higher and more binding obligation to the court and to public justice, and in the performance of that duty he is bound to attend the court during the whole time the proceedings continue until their final termination. The duty being the same, the same principle applies, the same reason for the privilege exists. Public justice requires that a person so circumstanced shall be protected; for if he be not protected, then one who is out on bail, and is called on to attend when the consideration of the case is resumed, but is under the peril of being arrested on civil process, will be tempted to disregard the claims of public justice, and, at the time when he is bound to appear, will fail to do so. Since, then, in every case known to the law with the single exception to which I am about to advert, this protection exists, why should an exception be introduced in the case of a party accused of a crime (who it was scarcely denied in argument, is entitled to the privilege of going to the court and remaining there while the case is proceeding) the effect of which would be, without any ground or reason, to create an anomaly in the law on this very important subject?

As I have already observed, we find no authority directly affirming that the privilege exists; the question now arises for the first time; but I am of opinion that we must, by analogy to the law long established and supported by numerous authorities, extend to the case of parties accused of a crime, who are about to be put

1869

GILPIN v. COHEN.

upon their trial, or who are called upon to attend a preliminary proceeding before magistrates, the principle which has hitherto been applied to witnesses, prosecutors, and jurymen, in all cases civil and criminal.

We were pressed with the authority, on the one hand, of *Hare* v. *Hyde* (1), on the other hand of *Callans* v. *Sherry*. (2) It is unnecessary for us to pronounce any opinion as to which of those decisions, if they are inconsistent, is most in conformity with the principles of the law of this country; for this is not the case of a man having been acquitted on a criminal charge, and when the proceeding therefore is for ever at an end, but of a person under a criminal charge duly commenced and still undetermined, but postponed to a future day, on which he would be bound to attend. In my opinion a person so circumstanced is privileged from arrest under civil process on his way to the court where the preliminary investigation is conducted, whilst he remains there for the purpose of meeting the charge, and until he shall have returned from the court (there being no unnecessary delay in his so doing) to his own home. Therefore, without disputing the authority of any decision, I am of opinion that the defendant Benjamin is entitled to the privilege which he claims, and that the rule must be made absolute for his discharge from custody.

CHANNELL, B. I am also of opinion that the rule should be made absolute. It was not contended that a privilege did not exist in reference to criminal proceedings, but that, although it might be claimed in criminal as in civil proceedings, it did not apply to the party accused, but only to witnesses or persons in a similar situation to witnesses, or to a prosecutor or a juror. I agree in thinking there is no direct authority on this point. The two cases which most nearly approach this are the case of *Callans* v. *Sherry* (2), in the Irish courts, and the case of *Hare* v. *Hyde* (1), in which Lord Campbell pronounced a decision opposed to that case, and founded his decision principally on the practice which prevailed in this country. But I agree with my Lord in thinking it is unnecessary for us to say which of those two decisions is right, because the present case is not identical with either of them. We

(1) 16 Q. B. 394; 20 L. J. (Q.B.) 185. (2) Alc. & Nap. 125.

have, therefore, to see how the case stands on principle. Now, in the case of *Montague* v. *Harrison* (1), Willes, J., appears to have laid down a sound rule as to the matter in question when he says: "The principle upon which the privilege now in question rests is this—that a suitor who has obtained a judgment in a civil action cannot use the process of the Court for the purpose of withdrawing from another court a witness or other person without whose presence full justice cannot be done." Now here, it is true, the party was not in the situation of a witness called upon to give evidence, but he was entitled to have witnesses called on his behalf; and the very remand is allowed him in order to afford him an opportunity of producing evidence. I think, therefore, the case comes within the principle which is applied to other persons without whose presence full justice cannot be done; and I cannot myself conceive a stronger instance of such necessity than where a man is charged with a criminal offence, and his guilt or innocence may depend on the evidence offered against and for him.

I think that not only the principle enunciated by Willes, J., is the correct principle, but that it is really applicable to this case, and therefore should govern it. And I may observe that we are, to this extent, rendering complete the analogy between proceedings in a civil and in a criminal case; for it is not disputed that a party in a civil case, though not a witness, may claim his privilege of going to and returning from court. I am, therefore, of opinion that this rule should be made absolute.

PIGOTT, B. I am of the same opinion. The scarcity of authority on the subject may perhaps be accounted for by the fact that the system of bailing prisoners, and especially of letting them go on bail when they were remanded, was formerly not so prevalent as in recent times. Having, then, to decide the case upon principle, it seems to me that the principle laid down in *Montague* v. *Harrison* (2) equally applies here. It would be very inconsistent, on the one hand, to bind a man with sureties, and under his own recognizance to appear before a magistrate, and, on the other, to allow the sheriff to take him on civil process and carry him against

(1) 3 C. B. (N.S.) at p. 299; 27 L. J. (C.P.) 24.

(2) 3 C. B. (N.S.) 292; 27 L. J. (C.P.) 24.

1869

GILPIN v. COHEN.

his will in an opposite direction. I think, therefore, that the reason why privilege should be accorded applies fully to such a case as the present; and that the case is distinguishable from that of *Hare* v. *Hyde*. (1) The defendant Benjamin is accordingly entitled to his privilege, and the rule must be made absolute.

CLEASBY, B. I agree entirely in the conclusion which the Court has arrived at. This does not appear to me to be a question of practice, but of principle. It has nothing to do with the forms of procedure and the remedies of parties, but it relates to the administration of justice generally; and I should certainly be surprised to find that, governed as they are by the same principles, there should be a difference in the practice of the courts here and in Ireland. We need not enter into the consideration of that question; but, perhaps, if the cases were thoroughly examined, it might appear that no such difference really exists. (2) Now, as I

(1) 16 Q. B. 394; 20 L. J. (Q.B.) 185.

(2) In *Williams* v. *Steele* (4 Ir. Law Recorder, 169), where the defendant attended under recognizances, but it does not appear in what character, and was apprehended on his way home, he was discharged, Burton, J., saying: "The attendance in pursuance of his recognizance here is your best ground."

In *Callans* v. *Sherry* (Alc. & Nap. 125), a prisoner having come to take his trial under recognizances, was acquitted, and was arrested on his way home; he was discharged, the Court saying — "That case (*Williams* v. *Steele*) is quite decisive of the present question. There are many cases where parties are compelled to attend courts of justice under a penalty, as in the case of jurors, or of prosecutors under recognizances; and where parties are thus obliged to attend, the Court will grant them protection going and returning. If it were otherwise, a recognizance might be used as a mere trap to deprive a man of his liberty."

In *Kelly* v. *Barnwell* (Cook. & Alc. 94) one had come on his recognizances for the trial in Ireland of a charge against himself, which, before it was actually tried, was removed into the Queen's Bench; he was arrested whilst returning to England, but at the time he was arrested he was also on his way, in obedience to a summons, to appear before the Commissioners of Bankruptcy in England. The Court discharged him on both grounds, saying with reference to the first ground, and to *Anon.* (1 Dowl. 157), which had been cited—"It does not appear that in this case the defendant was discharged from legal custody in the sense in which those words used in that report are applicable to the facts in that case."

On the other hand, in *Rex* v. *Mc Loughlin* (Alc. & Nap. 130) the defendant had been *committed for trial*, and ultimately bound over to keep the peace. He was detained on a ca. sa. from the Common Pleas. An application was made to the Queen's Bench, who declined to entertain it, saying they had no authority to do so, and

have said, this is a question of principle relating to the administration of justice generally, and the privilege, although called the privilege of the witness, is in reality not his personal privilege, but his only because he is concerned at that time in the administration of justice; and in that sense I quite subscribe to what is said by Williams, J., in *Montague* v. *Harrison* (1), where he closes his judgment with the words, "the privilege is not that of the witness, but of the Court, for the purpose of ensuring a due administration of justice." Now, the principle being that process for the purpose of enforcing a judgment in one court of justice is not to operate as an obstruction to the administration of justice in another court, we have only to apply that principle to this case, and I think the conclusion is obvious. In the ordinary course of the administration of justice a prisoner is let out upon bail; in one sense he is said to be in the custody of the bail, but that only means they are responsible for his appearance; he is perfectly master of his actions, and is to determine whether he will or will not make his appearance and take his trial. Now, it is the object of this protection accorded to persons whose presence is required in the administration of justice, that they should feel that, in discharging this duty, both in going and returning, they will not be molested by the process of any civil court. That principle is obviously applicable to the present case, and leaves no doubt as to what we ought to do in it; but is it at all at variance with the decision of any court of this country? Certainly not. In *Hare* v. *Hyde* (2) the person whom the Court refused to discharge had not gone to take his trial in obedience to the process of the court which tried him. He had been apprehended and taken in custody to be tried. After his trial, justice having nothing more to do with him, he was discharged. Why should he, under those circumstances, have any privilege? He had none in going; he had never been in the position of exercising an option whether he would go or not; therefore he was not in the position of a person in whose behalf it was at any time necessary to interpose this privilege; and I much doubt

---

referring the defendant to the Common Pleas. Afterwards, it is stated, the application was repeated, and, after discussion, refused.

(1) 3 C. B. (N.S.) at p. 298; 27 L. J. (C.P.) 24.

(2) 16 Q. B. 394; 20 L. J. (Q.B.) 185.

1869

GILPIN v. COHEN.

whether a case can be found in the books where, under such circumstances, protection has ever been granted by the Court. Now, there is an obvious distinction between the case of a person apprehended under a charge of felony, and tried, and then discharged, and the case of one who, being under recognizances to be tried, goes up to take his trial in pursuance of those recognizances, and where, therefore, it is a matter for his own will and action whether he will go or not. That was the case in the Irish courts of *Callans* v. *Sherry* (1), which presents a state of facts resembling that which exists here.

The present case is, however, a still stronger one for discharging the prisoner. I, therefore, see nothing opposed to our decision either in *Goodwin* v. *Lordon* (2) or in *Hare* v. *Hyde* (3); and I am clearly of opinion that the attendance of this person ought to be protected, because it was in his power to decide whether he would go or not, and it would interfere with the administration of justice if he were not protected.

Rule absolute.

Attorneys for plaintiff: *Torr, Janeway, & Tagart.*
Attorney for defendant: *T. W. Payne.*

(1) Alc. & Nap. 125.
(2) 1 A. & E. 378.
(3) 16 Q. B. 394; 20 L. J. (Q.B.) 185.

EASTWOOD *v.* AVISON. 1869 Jan. 28.

Will—Construction—Estate Tail by Implication—Presumption—Dying without Issue.

By a will made before the passing of the Wills Act (1 Vict. c. 26), the testator devised certain property to S. his grandson, "and if he shall die without issue that property shall return to the E. family; but if he lives to have children he shall have power to make a will of it to his children":—

Held, that under these words, S. took an estate for life only, and not an estate tail by implication.

5 App Cas 450, 461

EJECTMENT for certain property at Pymroyd, in the parish of Almondbury, in the county of York.

Samuel Eastwood, being owner in fee of the property in question together with other property, by his will, dated May, 1834, disposed of the whole in the following terms:—"I give and bequeath unto my son Samuel, the closes called Idlehill, &c. . . . . and those eight cottages at Pymroyd, and also the property under lease to Sir J. Radcliffe, at Millbridge . . . . . but if my son Samuel dies without issue, the property at Millbridge left to him shall go to Samuel Eastwood, son of my son William Eastwood, at my son Samuel Eastwood's death; and the estate left to him at Pymroyd shall go to his children after his death, but if he dies without issue he shall have power to make a will of it, but not to leave it out of the Eastwood family [here follow devises of other property at Pymroyd to John, another son of the testator, and to the said Samuel]; but the above property at Pymroyd *if either of them* (i.e. John, or Samuel the grandson) *die without issue, that property shall return to the Eastwood family, but if they live to have children they shall have power to make a will of it to their children.*" The will also gave certain leasehold property to William Haig, a son of a daughter of the testator "during his natural life, and at his death it shall go to his children, but if he dies without issue it shall go to his brother John Haig's children and Eliza Haig's children." There were similar devises of certain freeholds to John Haig, "but if he dies without issue that property to go to William Haig's children and Eliza Haig's children," and of certain other freeholds to Eliza Haig, "but if she dies without issue that property shall go to William Haig's children and John Haig's children."

1869

EASTWOOD v. AVISON.

The testator died in 1835. William, his eldest son, pre-deceased him, leaving two sons; John, the now plaintiff, the heir-at-law of the testator, and Samuel, the devisee secondly above-named, who, conceiving himself to be tenant in tail by implication of the property left him at Pymroyd under the terms of his grandfather's will, conveyed it, after the due execution and enrolment of a disentailing deed, to one Alfred Jessop in fee. Jessop subsequently resold it to the now defendant. The question between the parties therefore was, whether the will passed an estate for life only in the property to Samuel Eastwood, the grandson, or an estate tail. In the former case, the plaintiff was entitled as heir-at-law of the testator; in the latter, the defendant, as claiming under Samuel, the devisee.

The cause was tried before Bramwell, B., at the Leeds summer assizes, 1868, and a verdict was entered for the defendant, with leave to move to enter a verdict for the plaintiff, on the ground that Samuel, the son of William Eastwood, took an estate for life in the property only.

A rule having been obtained accordingly,

Nov. 14, 1868. *Manisty*, Q.C., and *Waddy*, shewed cause, and contended that on the true construction of the will, Samuel Eastwood took an estate tail by implication: *Machell* v. *Weeding*. (1) Such a construction would unquestionably be in accordance with the testator's real intention, as manifested by the will, looked at as a whole.

Field, Q.C., *Joshua Williams*, Q.C., and *Wills*, in support of the rule. The estate which Samuel took was for life only. There is a power to appoint among his children by will, but that power, if unexecuted, confers no greater estate on the appointor than he would otherwise have had, and it rebuts the implication of an estate tail being conferred by the previous words. Again the expression "die without issue," which before the Wills Act (1 Vict. c. 26), s. 30, would have meant an indefinite failure of issue, if it stood alone, must be taken in this will to mean "die without *children*." Certainly if the word "children" preceded the word "issue," this would be the true construction; and considering the word in connection with

(1) 8 Sim. 4.

the prior devise, and the words following it in the same clause, it should be held equivalent to "children" here. They cited Jarman on Wills, vol. 2, pp. 418—20, 434—457, 3rd ed.; *Goodright* v. *Dunham* (1); *Hockley* v. *Mawbey* (2); *Bradley* v. *Cartwright* (3); Sugden on Powers, 8th ed. p. 597.

Cur. adv. vult.

Jan. 28. The judgment of the Court (Kelly, C.B., Pigott and Cleasby, BB.) was delivered by

KELLY, C.B. In this case the will having been made before 1838, the devise (omitting words that are immaterial) is, "To Samuel the son of my son William, and if he shall die without issue, that property shall return to the Eastwood family; but if he lives to have children, he shall have power to make a will of it to his children."

It is admitted that "to Samuel, and if he shall die without issue" then over, gives an estate tail by implication; but the question is, whether the subsequent power is inconsistent with the previous gift of an estate tail, and so rebuts the implication; and whether the word issue must not be held to mean children. Now the language of the will is "if he live to have children he shall have power to make a will of it to his children." This enables him to make a will devising the property among his children as tenants in common in fee; and this seems clearly inconsistent with an estate tail, which in the supposed case would be an estate tail general, and would give the property, if Samuel should leave sons and daughters, to the eldest son as tenant in tail. This being so the implication is rebutted, and Samuel takes only an estate for life, with power to leave by will an estate in fee or any less estate to his children, and this construction is undoubtedly consistent with the actual will and intention of the testator, who in this, and in other devises to other children and grandchildren, clearly indicates his desire that, on failure of children of the devisees, the property should return to his own family. Indeed, in this very devise, he expressly says that "if Samuel shall die without issue, the property shall return to the Eastwood family." In

(1) 1 Dougl. 264. (2) 1 Ves. Jun. 142.
(3) Law Rep. 2 C. P. 511.

1869

EASTWOOD v. AVISON.

holding therefore that Samuel took an estate for life only, with a power, if he should have children, to devise the property to them, but in case he should have no children, that the property should return to the testator's family, we give effect at once to the general intent of the testator to be collected from the entire will, and the particular intent indicated in the clause in question.

We must consider the effect of the words in this clause "if he shall die without issue," together with the words next following, that in that event the property shall return to the Eastwood family; but that if Samuel lives to have children, he may make a will of it to his children. This clearly shews that the "issue" alluded to first, upon failure of which the property was to revert, means the children to whom Samuel might leave it if he should have any; and that again must mean children living at the time of his death, as it is to such children alone that he could leave the property by will. And this brings the case within the principle deducible from a number of authorities, that where the word "issue" means not any indefinite succession of issue, but children living at the time of the death of the first taker, the effect of the whole clause taken together is to give an estate for life only, the condition of the devise over being not an indefinite failure of issue, but there being no children living at the death of the first taker. In the great majority of these cases no doubt the word "children" or other limited description of issue comes before the words "if he shall die without issue," but there seems to be no just reason why, "if he shall die without issue" may not as well refer to the issue after mentioned, as the issue before mentioned, and here the context requires that construction; for when the testator says that if "Samuel shall die without issue" then over, but "if he shall live to have children," then he may devise to them, the plain meaning of the whole sentence is, that if he has children to whom he can leave the property at his death, then he may do so by his will; but if he has no such children, that is, no children living at the time of his death, or, in other words, if he die without children living at the time of his death, then the property is to revert to the Eastwoods.

It may be added that in all probability no case was ever decided in which it was more clear and certain that the testator intended the property to revert to the family, unless the first taker should

leave children at his death, than in this case, where in so many devises to members of the family, including the clause in question, a power is given to the first taker to leave the property to his children, evincing therefore a general intention that the property should return to the Eastwoods, not upon an indefinite failure of issue, but unless the first taker should leave children at his death. This construction is much fortified if the devise in question comes within the class of cases in which the effect of a devise is to confer not only a power to appoint but a gift by implication to the objects of the power, in default of appointment. And *Brudenell* v. *Elwes* (1) is conclusive to shew that a power to appoint or leave to children does not extend to grandchildren or any other description of issue. The power, therefore, in this case, to leave "to his children" must mean children living at his death, and it follows that the words "if he shall die without issue" must mean "if he shall die without children living at his death." Otherwise if he had left sons and daughters and appointed under the power to two or more of them in fee, the devise could not have taken effect, inasmuch as the eldest son alone would have taken the property as tenant in tail by reason of the implication.

We are of opinion therefore, upon principle and upon authority, that the grandson Samuel took under this will a life estate only, with a power to devise to his children if he should have children living at the time of his death; and, therefore, that he had no power to convey to Mr. Jessop, from whom the defendant bought, and that the plaintiff is entitled to have the rule made absolute.

Rule absolute.

Attorneys for plaintiff: *Edwards, Layton, & Jaques.*
Attorneys for defendant: *Learoyd & Bleby.*

(1) 1 East, 442; 7 Ves. 382.

END OF HILARY TERM.

CASES

DETERMINED BY THE

COURT OF EXCHEQUER

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

EASTER TERM, XXXII VICTORIA.

1869
April 27.

CRAVEN *v.* SMITH.

Costs—County Court Act, 1867 (30 & 31 *Vict. c.* 142), *s.* 5—*Action for Slander—Damages not exceeding* 10*l.*—*Practice—Power of Court to refer to their own Proceedings.*

The 30 & 31 Vict. c. 142, s. 5, which enacts that if in *any* action the plaintiff shall recover a sum not exceeding 10*l.* in tort, he shall not be entitled to any costs, unless the judge certify that there was a sufficient reason for bringing the action in a superior court, or the court or a judge shall by rule or order allow such costs, applies to *all* actions, whether capable of being commenced in a county court or not.

In an action for slander the plaintiff recovered 5*l.* damages in a superior court. On an application for a rule for costs:—

Held, that inasmuch as he had *necessarily* brought his action in a superior court, and had recovered an amount of damages sufficient, in the absence of evidence to the contrary, to warrant the inference that his conduct in bringing it was neither frivolous nor vexatious, he was entitled to a rule for costs under 30 & 31 Vict. c. 142, s. 5.

Gray v. *West* (Law Rep. 4 Q. B. 175), commented on.

The Court has at all times power to look at its own records, and to take notice of their contents, although they may not be formally brought before the Court by affidavit.

DECLARATION for defamatory words imputing a felony to the plaintiff. The defendant suffered judgment by default, and there-

1869

CRAVEN v. SMITH.

upon a writ of inquiry was issued, which was executed on the 7th of January, 1869, before the undersheriff of Middlesex. The jury assessed the damages at 5*l*. The undersheriff on being asked to certify for costs under 30 & 31 Vict. c. 142, s. 5 (1), promised to do so if he had the power, adding that he considered the case a proper one for a certificate. After consideration, however, he came to the conclusion that he had no power to certify. A rule was then obtained in this Court, calling on the defendant to shew cause why the plaintiff should not be entitled to costs in this action, and why the master should not be at liberty to tax the same.

The rule was drawn up "upon reading the affidavits" of the plaintiff and another person, and contained no reference to the declaration. The affidavits also were silent as to the nature of the cause of action, and it was only by reference to a copy of the pleadings produced on the argument of the rule, that the fact of the action having been for slander, was brought to the notice of the Court.

Francis shewed cause. 1st. There are no materials before the Court on which this application can be decided. The nature of the action is not disclosed on the affidavits, and the record cannot be noticed unless it is in court and is verified by affidavit.

[KELLY, C.B. We must deal with the application for a rule on affidavits, it is true, but also on the assumption that we have power to look at our own records and proceedings.]

There really is no record in this case. At all events the original declaration filed should have been actually in court.

[BRAMWELL, B. The proceedings in a cause must be considered as in court for the purposes of being referred to. On application for a new trial, it is always considered that notice may be taken of the contents of the record in the action without its being formally brought before the Court. The whole argument proceeds on

(1) The 30 & 31 Vict. c. 142, s. 5, enacts that—"If in any action commenced after the passing of this act in any of her Majesty's superior courts of record, the plaintiff shall recover a sum not exceeding 20*l*., if the action is founded on contract, or 10*l*. if founded on tort, whether by verdict, judgment by default, or on demurrer or otherwise, he shall not be entitled to any costs of suit, unless the judge certify on the record that there was sufficient reason for bringing such action in such superior court, or unless the Court or a Judge at chambers shall by rule or order allow such costs."

1869

CRAVEN v. SMITH.

the assumption that the Court have a knowledge of the cause of action. In this respect our practice seems to differ from that of the Court of Common Pleas. Here and in the Queen's Bench the rule does not refer to the record. But in the Common Pleas it is drawn up "upon reading the record of Nisi Prius:" Chitty's Forms, 10th ed. p. 859.]

There is no analogy between this application, and one for a new trial where the Court have the judge's notes before them. (See Chitty's Forms, 10th ed. p. 887, for the *general* form of a rule nisi, which appears to be the same in all the courts.) 2ndly. Assuming that notice of the nature of the action can be taken, the plaintiff is not entitled to his costs. The terms of the County Court Act, 1867 (30 & 31 Vict. c. 142), s. 5, are general, and apply to "any action," and therefore include an action for slander, although it must, of necessity, be brought in a superior court. The plaintiff, therefore, requires a certificate to obtain costs. But he ought not to have them, for the intention of the act was to put a stop to the bringing of frivolous actions in a superior court, irrespective of the consideration whether they might or might not be brought elsewhere.

[BRAMWELL, B. If the section applies, you contend that the plaintiff is not entitled to a rule for costs. You might also contend that if it does not apply, he cannot have this rule made absolute. For in that case his proper course would have been not to come here for a rule, but to carry in his costs for taxation.]

That is so; and it may be that the section is limited to actions which might have been commenced in the county court. The judgment of the Queen's Bench in *Gray* v. *West* (1) leaves the point open.

[KELLY, C.B., intimated that the Court were of opinion that s. 5 of the County Court Act, 1867, applied to *all* actions.]

Then the plaintiff must shew some special reason in order to get costs, and here none appears.

[BRAMWELL, B. Is not the circumstance that the action could not be brought elsewhere, coupled with the fact of a substantial verdict having been returned, enough to constitute a primâ facie case requiring an answer from the defendant?]

No; the onus is on the plaintiff. The object of the enactment

(1) Law Rep. 4 Q. B. 175.

is to deprive of costs, unless some reason to the contrary be shewn by the plaintiff, where a verdict not exceeding 10*l.* is recovered. By s. 33 (schedule C.) of the act, the 34th section of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), is repealed. By that enactment a judge could deprive a plaintiff in an action for slander of costs, if he did not recover more than 5*l.* He has now lost that power, and unless the rule under s. 5 of 30 & 31 Vict. c. 142, is granted only under special circumstances, the intention of the legislature, which was to prevent more efficaciously than by the Common Law Procedure Act, 1860, s. 34, the bringing of vexatious actions, will be defeated.

Anderson, in support of the rule, contended, with regard to the first point, that the Court were at liberty to refer to their own records, although not verified by affidavit. [On the remaining questions he was not called upon to argue.]

KELLY, C.B. I think this rule should be made absolute. The first question is, whether we are at liberty to look at the record to ascertain the nature of the action. It is said we cannot—first, because it is not verified by affidavit; and, secondly, because it is not alluded to in the rule. Now, I am of opinion that the Court is always at liberty to look at its own records and proceedings; but if it were doubtful, the analogy put by my Brother Bramwell is conclusive. We are in the daily habit of granting rules for new trials and other similar applications, where it would be impossible to understand the nature of the case without a knowledge of the contents of the record; yet, in such cases, the record is never verified by affidavit, nor does the rule nisi, when drawn up, allude to it. I feel no doubt, therefore, that we may look at this record.

That being so, the main question arises, whether there are sufficient grounds for making this rule for costs absolute. Now the action was for a slander imputing a felony in the strongest and most offensive language. Judgment passed by default, and afterwards, on a writ of inquiry, a jury found for the plaintiff, with 5*l.* damages. The undersheriff, moreover, before whom the writ was executed, thought the plaintiff was entitled to a certificate for costs, but did not grant one, under the mistaken impression that he had no power to do so. In point of law he had power, for 30 & 31

1869

CRAVEN v. SMITH.

Vict. c. 142, s. 5, in my opinion, includes all actions. The words used are perfectly general, and give power to "the judge"—i.e. the judge who tries the cause—to certify "in any action" on the record that there was a sufficient reason for bringing it in a superior court. However, as he declined to certify, we are now called upon to say whether the plaintiff is entitled to a rule for costs under the latter part of the same section; and in arriving at a conclusion, we may give its fair weight to the judge's opinion, although we are in no way bound by it. Again, it may fairly be asked whether a judge ought not always to certify, unless some strong reason to the contrary is shewn, in an action which, like slander, can be brought in a superior court, and there only. I think that, where a plaintiff must seek redress in a superior court, or not at all, he is, generally speaking, entitled to his costs under this section. There may, doubtless, be cases where an action ought not to have been brought at all, and then, perhaps, a judge would be right in refusing to certify. But this case, at all events, is not one of that description. There was amply sufficient reason here for bringing an action, and therefore the plaintiff is, in my opinion, entitled to a rule for his costs.

BRAMWELL, B. I am of the same opinion. We have before us the record and the affidavits. Thence it appears that the action was for slander, in which 5*l.* damages were recovered. I think that s. 5 of the County Court Act, 1867, includes slander, and therefore, unless there is a rule or order for costs, the plaintiff cannot recover them, the judge at the trial not having certified. Now the words complained of were most offensive, and by their verdict the jury have given a substantial recognition of the propriety of the action. Therefore, as it could not have been brought anywhere else than in a superior court, I think we ought to—I had almost said must—grant this rule. But then it has been ingeniously argued that this is not so. The statute has fixed 10*l.* as the smallest amount which will carry costs; and the fact of the amount recovered being less is enough, it is said, unless some substantial reason be shewn upon the merits, to deprive the plaintiff of costs. I do not, however, think the statute bears this meaning. A special reason is only made necessary, according to the way I

think the statute should be read, where the action might have been brought in the county court. Where the action is one which could not be brought there, as in this instance, and where the plaintiff recovers such damages as have been given here, I am of opinion that a primâ facie case for costs being granted is made out, which requires an answer from the defendant.

The case of *Gray* v. *West* (1) appears at first sight to lay down that in all cases which must be brought in a superior court, an order or rule for costs ought to be granted. I do not, however, desire—and I do not think my Brother Hayes, in delivering the judgment of the Court of Queen's Bench, desired—to lay down so wide a rule. For the action might be vexatious, and I should be very sorry to be obliged to regard the verdict of the jury as absolutely conclusive. But in the present case, at all events, there was a primâ facie case for costs. It was not answered by the defendant, and the rule should therefore be made absolute.

PIGOTT, B. I am of the same opinion. I think the case is within the terms of the 5th section of the County Court Act, 1867. I also agree that we have sufficient materials before us for our decision. We have the affidavits, and we must also consider our own record to be before us. That being so, we ought not to shut our eyes to its contents. No hardship or surprise can be involved by our doing so, any more than in the analogous case of a motion for a new trial put by my Brother Bramwell. Then the affidavits shew that the judge thought this a proper case for a certificate; and, looking at the circumstances, I concur in the opinion which he expressed.

CLEASBY, B. I am of the same opinion, although I have some difficulty on the first point, as to our power of looking at the record in this action. The Court, it must be remembered, does not take judicial notice of its records in the same manner as of an Act of Parliament. However, I find in Chitty's Forms, 10th ed. p. 870, there is a difference of practice between this Court and the Common Pleas as to the proper form for a rule to arrest judgment, as well as for a new trial. The rule here and in the Queen's Bench

(1) Law Rep. 4 Q. B. 175.

1869

CRAVEN v. SMITH.

is drawn up "upon notice of this rule," and no more. In the Common Pleas it is drawn up "upon reading the record of nisi prius," and notice of the rule. The latter practice seems to me the more correct one, especially on motion for arrest of judgment, when it is essential that the contents of the record should be before the Court. According to the practice of this Court, therefore, even on a motion to arrest judgment, the record may be looked at, although not referred to in the rule or affidavits. It follows that we may look at it on such an application as the present. As to the other questions I agree with the rest of the Court.

Rule absolute.

Attorney for plaintiff: *G. E. Carpenter.*
Attorney for defendant: *W. H. B. Pain.*

May 4.

WALKER *v.* CORY.

Practice—Rule to set aside Nonsuit—Power of Defendant to object to Verdict being entered for Plaintiff on the Ground that it would be against the Evidence—Notice.

On the argument of a rule to set aside a nonsuit on the ground that upon certain findings of the jury the verdict should have been entered for the plaintiff, the defendant may show that the verdict, if so entered, would be against the weight of evidence, although he may not have informed the Court within the first four days of the term succeeding the trial of his intention to raise such an objection.

THIS cause was tried at the London sittings after Hilary Term, before Kelly, C.B., when, upon certain findings of the jury, the learned judge directed a nonsuit to be entered, with leave to move to enter a verdict for the plaintiff. A rule was obtained accordingly; on the argument of which, the Court having expressed an opinion that the nonsuit should be set aside,

J. Brown, Q.C. (*Holl* with him), in shewing cause, proposed to contend that the verdict, if entered for the plaintiff, would be against the weight of evidence, and that therefore the rule should be made absolute, not to enter the verdict, but for a new trial.

Prentice, Q.C., and *F. M. White*, in support of the rule. The defendant not having informed the Court within the first four

days of term of his intention to object to the verdict being entered for the plaintiff on the ground that it would be against the weight of evidence, is now precluded from doing so. In *Deacon* v. *Stodhart* (1), where there was a verdict for the defendant on one of three issues, and for the plaintiff on the other two, the plaintiff obtained a rule nisi to enter the verdict for him on the issue found for the defendant. Thereupon the defendant, on the eleventh day of the term after the trial, applied for a cross rule to enter the verdict for him on one of the issues found for the plaintiff. It was held that the application was too late. The same principle governs this case. At least notice should have been given to the plaintiff that this objection would be taken.

[KELLY, C.B. It would have been convenient and proper to have given a notice to the plaintiff.]

J. Brown, Q.C., contrà. The case cited is not in point, for here no cross rule could be applied for.

THE COURT (Kelly, C.B., Bramwell, Pigott, and Cleasby, BB.) held that the defendant was entitled ex debito justitiæ to object to a verdict being entered, on the ground that it would be, if entered, against the weight of the evidence, although he had not intimated his intention to do so to the Court within the first four days of term.

Attorneys for plaintiff: *Mercer & Mercer.*

Attorneys for defendant: *Cowdell & Grundy.*

(1) 2 M. & G. 317.

1869

April 16.

DIXON *v.* WRENCH.

Debtor and Creditor—Charging Order—Interest in Produce of Stock and Shares —1 & 2 Vict. c. 110, *s.* 14—3 *& 4 Vict. c.* 82, *s.* 1.

8 QBD 223

A testatrix gave her whole estate and effects, which included stock and shares, to trustees; on trust to pay debts and legacies, and as to the residue of her estate and effects, upon trust for the defendant and two other persons; and she directed her trustees to pay the legacies so soon after her decease as her means could be judiciously converted into cash, and in any event not later than twelve months after her decease. A charging order having been made upon the stock and shares, to the extent of the defendant's interest therein, in favour of a judgment creditor:—

Held, that the defendant having no interest in the stock and shares, but only an interest in their produce after performance of the prior trusts, they could not be charged with his judgment debt under 1 & 2 Vict c. 110, s. 14, or 3 & 4 Vict. c. 82, s. 1.

Cragg v. *Taylor* (Law Rep. 2 Ex. 131), distinguished.

Rule to discharge an order made at chambers on the 12th of March, 1868, by which Willes, J., charged the sum of 223*l.* 4*s.* 10*d.* Three per Cent. Reduced Annuities, standing in the joint names of C. Hilhouse and Matilda Wrench, deceased, and the dividends thereon, with the payment of 28*l.* 7*s.* 4*d.*, the amount for which judgment had been recovered by the plaintiff against the defendant, with interest, to the extent of the defendant's interest therein; and a similar order of the same date, charging with the same judgment debt seventy-eight preference shares, Classes B. & C., in the Stockton and Darlington Railway, standing in the name of Matilda Wrench, deceased, to the extent of the defendant's interest therein.

The interest of the defendant arose under the will of Matilda Wrench, executed in the Scotch form, and dated the 3rd of February, 1865, by which the testatrix gave, granted, assigned, and disposed to and in favour of B. W. Wynne and G. W. Skyring, or the acceptor or survivor of them, as trustees, all and sundry lands, &c., and in general the whole means, estate, and effects of the testatrix: on trust, in the first place, for the payment of debts, funeral and trust expenses; secondly, for the payment of certain specific and pecuniary legacies; and, with regard to the residue and remainder of her said estate and effects, upon trust to pay, assign, and dispose the same equally between the defendant and two other persons, when they should attain the age of twenty-one

years respectively; and the testatrix directed her trustees to pay or invest, as thereinbefore directed, the legacies thereby bequeathed, so soon after her decease as her means could be judiciously converted into cash, and, in any event, that this be done not later than twelve months after her death.

The testatrix died on the 18th of October, 1866, being at the time of her death absolutely entitled to the stock and shares charged by the orders in question.

The defendant having mortgaged his share to one Banks, he and Banks, on the 16th of April, 1867, filed a bill in Chancery against Wynne, the surviving trustee, for the administration of the testatrix's estate; and on the 27th of July, 1867, a decree was made directing the usual inquiries, and ordering that the personal estate not specifically bequeathed be applied in payment of debts, funeral expenses, and legacies in a due course of administration.

The plaintiff having afterwards recovered judgment in this action, and obtained the orders in question, the course of administration was impeded, the trustee being no longer able to deal with the stock and shares; and this rule was now moved in pursuance of an order made in the suit by Vice-Chancellor Malins.

The rule having been obtained in Michaelmas Term, 1868, and argued in Hilary Term, 1869, by *McIntyre* against the rule, and *Day*, in support of it, the Court, after examining the will, directed the case to be re-argued.

April 16. It was re-argued accordingly.

McIntyre, against the rule. Although the interest of the defendant in the stock and shares is a contingent and remote one, and not within 1 & 2 Vict. c. 110, s. 14, it is at least within 3 & 4 Vict. c. 82, s. 1. (1) The case of *Cragg* v. *Taylor* (2) is a decisive

(1) 1 & 2 Vict. c. 110, s. 14, enacts that when any person against whom judgment shall have been entered up in any of the superior courts at Westminster, shall have government stock, or stock or shares in any public company, "standing in his name, in his own right, or in the name of any person in trust for him," such stock or shares may be charged by a judge's order with the payment of the amount of the judgment, and interest thereon.

3 & 4 Vict. c. 82, s. 1, enacts that the provisions of the previous act shall be deemed "to extend to the interest of any judgment debtor, whether in possession, remainder, or reversion, and whether vested or contingent," as well in any such stock or shares, as in the dividends, interest, or annual produce of such stock, &c.

(2) Law Rep. 2 Ex. 131.

1869

DIXON v. WRENCH.

authority in favour of the plaintiff, for there, as here, the trustees were directed in the first instance to sell the shares, so that all the beneficial interests under the deed were only interests in the proceeds of the sale.

Day, in support of the rule. *Cragg* v. *Taylor* (1) is not in point, for there the conversion was only to be for the purpose of paying the debt, which was the first charge, and of raising and applying portions of the trust fund, which was the second charge. But until circumstances arose which made it necessary to sell the shares in order to satisfy those purposes, there was nothing to prevent the shares from remaining in specie, and they had, in fact, so remained. But here the trustees are by the will peremptorily directed to sell the shares at the utmost within twelve months of the testatrix's death; their proceeds are to be applied to debts and legacies; and it is only in the residue of their proceeds that the defendant has any interest at all. The present order interferes with the administration of the estate, and prevents the very process by which the interest of the defendant is, according to the direction of the will, to arise.

KELLY, C.B. The real and only question is, whether this stock and these railway shares are standing in the name of the judgment debtor in his own right, or in the name of any one in trust for him (1 & 2 Vict. c. 110, s. 14). Now, looking at the will under which the judgment debtor derives his title, it is perfectly clear that, though he has an interest in the proceeds of this property when converted into money, there is no immediate trust of either stock or shares in his favour. On the contrary, there is a positive direct obligation on the trustees, before any right or interest can arise in the defendant, to realize these funds and apply them to the purposes of the will. It is said that this amounts to a contingent interest in the defendant, and that under the later act it can be charged. The later act, however (3 & 4 Vict. c. 82, s. 1), merely relates to the nature of the judgment debtor's interest in the stock or shares, and has no effect or operation where no such interest whatever exists in him. But, as I have already said, it is plain that there is in the defendant no interest whatever in the

(1) Law Rep. 2 Ex. 131.

stock and shares, whether immediate or future, vested or contingent, but only in the residue of their proceeds. If the legislature had meant to include under the provisions of the act such a case as this, they would, no doubt, have expressed this intention in apt words.

I must, however, notice the case of *Cragg* v. *Taylor* (1), because at first sight it might seem opposed to our present decision, there being in that case also a power in the trustees to sell the stock and apply the proceeds. But if that case is examined, it will be found to differ essentially from this; for there the deed which was relied on as taking the stock out of the provisions of the act did not actually transfer the shares, which were already mortgaged, but only rendered it incumbent on the defendant to procure their delivery over to the trustees, that they might execute the trusts of the deed. They, no doubt, were entitled to sell the shares, or the defendant's equity of redemption in them, but in the meantime, and until the shares were transferred to them, the owner retained an immediate right in them himself. And even supposing the shares to have been transferred to the trustees, still, so long as they remained unsold, the defendant had, after the performance and satisfaction of the other trusts, an interest in them by virtue of the ultimate trust in favour of him and his assigns. There was therefore a contingent or reversionary interest in the shares in the defendant, and the case was within the statute. That case is therefore plainly distinguishable; our decision is not opposed to any authority; and since it is clearly expressed by the statute that there must be an interest in the stock or shares themselves before a charging order can be made, we must make the rule absolute to rescind the orders in question.

BRAMWELL, B. I am of the same opinion, though, in looking at the substance of the matter rather than the form, I have had some difficulty; for, no doubt, if the defendant's contention is right, although the share of the defendant might, after the payment of debts and legacies, come to, say 1000*l.*, he would nevertheless have no interest which could be charged under the act. The statute (1 & 2 Vict. c. 110, s. 14), however, does not say that

(1) Law Rep. 2 Ex. 131.

1869

DIXON v. WRENCH.

whenever a judgment debtor has any interest in property, it may be charged, but that a charging order may be made on stock or shares standing in his name "in his own right, or in the name of any person in trust for him;" by which I take it to be meant that they are in his own name, so that he can sell them himself, or in the name of a trustee, so that he can direct the trustee to sell them. The second act (3 & 4 Vict. c. 82, s. 1) made no difference, except in providing for a reversionary or contingent interest; there must equally be an interest in the debtor, or in a trustee for him. Now here the stock and shares are neither in the name of the debtor nor of a trustee for him, but, to put the case most favourably for the plaintiff, in the name of executors, who hold them, not in trust for the defendant in the same sense in which the act uses the word, but in trust to sell.

As to the case of *Cragg* v. *Taylor* (1), I think the decision right, and I agree with the distinction drawn by the Chief Baron, and which is indicated in his judgment in that case, where he states that the fifth trust of the shares was for the defendant and his assigns. That was only a contingent interest; but it was nevertheless sufficient to make the shares in question shares standing in the name of another in trust for him.

CLEASBY, B. I am of the same opinion, and without hesitation. The acts in question were passed, not for the purpose of charging property in general, but for the purpose only of charging particular kinds of property, that is, stock and shares, under particular circumstances. Now it is quite clear that there is no actual interest in the defendant in these shares, nor did they stand in the name of any one in trust for him. The defendant's interest under the will was at most a very contingent interest, the directions to the executors being to sell and pay debts and legacies, and to divide the residue of the money (if any) among the defendant and certain other persons. But as to the stock and shares themselves, not only had not the defendant any direct or immediate interest in them, but he had not even a contingent interest; and further, if he had had any interest capable of being charged, the executors could not have carried out the object of the will by selling them,

(1) Law Rep. 2 Ex. 131.

and the defendant could never have realized his interest. The 15th section of the act (1 & 2 Vict. c. 110) shews that the effect of such an order is instantly to operate as a stop order; so that the stock can no longer be disposed of, and the estate cannot therefore be administered so long as the order remains undischarged. (1) In fact the stock and shares are not even standing in the name of the executors, but of the deceased, which imports a further difficulty into the case. But, suppose the transfer to be already made, the duty of the trustees is to sell, not to hold the stock and shares in trust for the defendant.

Rule absolute to rescind the charging orders.

Attorneys for plaintiff: *N. C. & C. Milne.*
Attorneys for defendant: *Rooks, Kenrick, & Harston.*

ISITT *v.* BEESTON.

April 22.

Act of Bankruptcy (12 & 13 *Vict. c.* 106, *s.* 67)—*Fraudulent Delivery of Goods.*

A delivery of goods to be an act of bankruptcy within 12 & 13 Vict. c. 106, s. 67, must pass, or purport to pass, some property or interest in the goods.
Cotton v. *James* (1 Moo. & M. 273), followed.

TROVER by the plaintiff, as creditors' assignee of one Lockett, to recover the value of goods removed by the defendant from Lockett's premises, under circumstances alleged by the plaintiff to amount to an act of bankruptcy in Lockett. The goods consisted of furniture and stock-in-trade; and they were, at 4 A.M. on the

(1) By 1 & 2 Vict. c. 110, s. 15, a charging order made ex parte, if it affect any government stock, "shall restrain the governor and company of the Bank of England from permitting a transfer of such stock in the meantime and until such order shall be made absolute or discharged;" if it affect any stock or shares in any public company, it "shall in like manner restrain such public company from permitting a transfer thereof;" and if, after notice of such order, and before the same order shall be discharged or made absolute, a transfer is permitted, the corporation or person or persons so permitting such transfer shall be liable to the judgment creditor for the value or amount of the property, or so much thereof as may be sufficient to satisfy the judgment; and no disposition by the judgment debtor in the meantime shall be valid or effectual as against the judgment creditor.

1869

ISITT v. BEESTON

12th of August, 1868, in pursuance of a direction given by Lockett on the previous evening, removed by the defendant from Lockett's premises, and taken to the London Depository Company's warehouse, kept by the defendant. On the same morning, but subsequently to the removal, Lockett left his house with his family, and on the 20th of August he was adjudicated a bankrupt. After the goods were deposited with the defendant, he advanced money upon them to the bankrupt. The plaintiff claimed the goods without tendering the amount of the defendant's lien.

The case was tried before Martin, B., at Westminster, on the 3rd of December, 1868. No evidence was given of any knowledge by the defendant of Lockett's circumstances; and the learned judge, following the case of *Cotton* v. *James* (1), held that, as the removal of the goods on the 12th of August was not intended to pass any property in them, it was not a fraudulent "delivery or transfer," within 12 & 13 Vict. c. 106, s. 67, and therefore not an act of bankruptcy; and he nonsuited the plaintiff, giving him leave to move to enter a verdict for 40*l.*, the value of the goods.

A rule having been obtained accordingly,

Francis shewed cause. No fraud or connivance is shewn, and therefore, unless the removal of the goods was itself an act of bankruptcy, the plaintiff cannot succeed. It is not necessary even to claim the protection of s. 133 of the Bankruptcy Act, 1849 (12 & 13 Vict. c. 106), for unless the removal was itself an act of bankruptcy, the act of bankruptcy was subsequent to the transaction. But *Cotton* v. *James* (2) lays down expressly that the "delivery" meant by the act is a delivery passing property; and that this is so is clear, when it is remembered that the words "gift, delivery, or transfer," were inserted in 6 Geo. 4, c. 16, s. 3, for the purpose only of remedying the inconvenience caused by the decisions that the earlier acts did not include a transfer otherwise than by deed. The delivery must be an act of the same kind as the earlier "grant or conveyance," that is, an act passing property. He also cited *Cole* v. *Davies.* (3)

Pollock, Q.C., and *Day*, in support of the rule. *Cole* v. *Davies* (3)

(1) 1 Moo. & M. 272. (2) 1 Moo. & M. 273, 278.
(3) Ld. Raym. 724.

proves nothing, for the section (s. 2) of the act then in force (1 Jac. 1, c. 15), which described acts of bankruptcy, contained no words which could include removal. *Cotton* v. *James* (1) is no authority, for there the defendant, who had to support the bankruptcy, failed to prove that the bankrupt had anything to do with the alleged delivery; the case, therefore, failed on the facts, and what was said as to the construction of the statute was obiter dictum. What has taken place here is within the words of the statute, for it is a "fraudulent delivery;" and if this be so, the bona fides of the defendant cannot prevent it from being an act of bankruptcy; neither can the protection given by s. 133, for that only protects against the effect of prior acts of bankruptcy, and not where the transaction impeached is itself the act of bankruptcy: *Hall* v. *Wallace* (2) approved in *Belcher* v. *Magnay*. (3) If, however, it is held that to make a delivery of goods an act of bankruptcy some interest must pass, it may be contended that an interest did pass to the defendant, who by the delivery acquired a lien on the goods for his charges.

KELLY, C.B. The bankrupt having early in the morning delivered his goods to the defendant, or, in order that they might be so delivered, placed them at the door of his house, and the defendant having removed them to a place of deposit, the question is, whether this delivery or removal constituted an act of bankruptcy within the statute. Now, a mere act of removal is no act of bankruptcy, unless it amounts to a delivery within the statute. Was there, then, in this case such a delivery? That depends on the construction of s. 67 of the Bankruptcy Act, 1849; and *Cotton* v. *James* (1) is decisive that a delivery of this kind is not within the section. In order that a delivery of goods should amount to an act of bankruptcy, it must be a delivery conveying, or purporting to convey, an interest in the goods. Here it is not pretended that the bankrupt conveyed any interest in these goods to the defendant, and the case is, therefore, directly within the authority of *Cotton* v. *James* (1), and the doctrine there expressly laid down by Lord Tenterden, C.J., and Parke and Littledale, JJ.

(1) 1 Moo. & M. 273. (2) 7 M. & W. 353.
(3) 12 M. & W. 102.

1869

ISITT v. BEESTON.

For as to the argument that the mere delivery to the carrier gave the carrier an interest in the goods, by virtue of his lien, to the extent of his lawful charges, and so brought the delivery within the act, it hardly merits an answer; it is obvious that if this were enough, any transaction whatever requiring the employment of a carrier, or even of a messenger, to give it effect, would be a delivery within the act.

MARTIN, BRAMWELL, and CHANNELL, BB., concurred.

Rule discharged.

Attorneys for plaintiff: *Rooks, Kenrick, & Harston.*
Attorneys for defendant: *Monckton & Monckton.*

April 28.

THE ECCLESIASTICAL COMMISSIONERS *v.* MERRAL.

Corporation—Common Seal—Landlord and Tenant—Demise for a Term of Years—Tenancy from Year to Year.

One who enters upon, occupies, and pays rent for corporate property under a demise for a term of years, made on behalf of the corporation, but not sealed with their common seal, becomes tenant from year to year of the corporation, on such terms of the demise as are applicable to a yearly tenancy.

Wood v. *Tate* (2 B. & P. (N. R.) 247), followed.

Semble, per Kelly, C.B., that when an individual contracts with a corporation in such a manner that the contract, though not under seal, may be enforced in equity against them, the individual is bound at law by any stipulation by him, which is made in consideration of the liability so imposed upon them.

APPEAL from the Westminster County Court.

On the 26th of June, 1863, the defendant and Messrs. Clutton, the agents of the plaintiffs, entered into an agreement for a demise by the plaintiffs to the defendant of a house, for three years from Lady Day, 1863; the defendant agreeing, amongst other things, "to put and maintain the said premises in tenantable repair, both externally and internally, and so to deliver them up at the end of the said term, tenant's fixtures and fittings excepted." This agreement was signed by the defendant and by Messrs. Clutton, but was not sealed with the common seal of the plaintiffs, who are, by 6 & 7 Wm. 4, c. 77, s. 1, a corporation.

1869

ECCLESIASTICAL COMMISSIONERS v. MERRAL.

The defendant occupied the premises during the term of three years, and, at its expiration, held over for two years more, paying the reserved rent. He quitted at Lady Day, 1868, in pursuance of a six months' notice to quit.

The plaintiffs sued the defendant in the county court for dilapidations caused by non-repairs, claiming 25*l*. It was objected that the agreement, not being under the plaintiffs' common seal, was void, or at all events constituted only a yearly tenancy on such of the terms of the agreement as were applicable, and that the stipulation as to repairs could not be imported into a yearly letting. The learned judge refused to nonsuit the plaintiffs, and ruled that the defendant was during the last two years tenant from year to year of the premises, on such of the terms of the agreement as were applicable; and he also ruled that the stipulation as to repairs was applicable. (1) The jury found a verdict for the plaintiffs for 15*l*.; and the defendant having appealed, the learned judge stated this case.

April 26. *Anstie*, for the defendant. The plaintiffs, being a corporation, had no power to demise, except by deed, and can only sue for use and occupation, on the footing of the real contract created by the defendant's enjoyment of the plaintiffs' property. This is expressly laid down in *Dean and Chapter of Rochester* v. *Pierce* (2); *Southwark Bridge Company* v. *Sills* (3); and *Mayor of Stafford* v. *Till*. (4) In the case last cited, Best, C.J., says: "Where a party has occupied land, the contract between him and the landlord must be considered as executed, so that there is no necessity for alleging in the declaration an express promise to pay: from the fact of occupation, a promise to pay will be implied. . . . . In the present case, the land having been enjoyed by the defendant, the promise to pay for it is implied, and there is a good consideration for the promise." This reasoning excludes the right of the plaintiffs to sue in the present case, for they must sue upon a promise which would not be implied by law, and they not being bound by the agreement, the defendant gets no consideration for this further promise. There is

(1) See *Richardson* v. *Gifford*, 1 Ad. & E. 52; *Arden* v. *Sullivan*, 14 Q. B. 832; 19 L. J. (Q.B.) 268.

(2) 1 Camp. 466.

(3) 2 C. & P. 371.

(4) 4 Bing. 75, 77.

1869

ECCLESIASTICAL COMMISSIONERS v. MERRAL.

therefore no mutuality, and the case is the same as *Swatman* v. *Ambler* (1), where a lessor who had not executed the lease was held not entitled to sue upon the covenants contained in it.

April 28. *Gates*, for the plaintiffs. (2) The defendant is bound by the agreement, for the plaintiffs are also bound by it: *Marshall* v. *Corporation of Queenborough* (3), and *Stevens' Hospital* v. *Dyas* (4), shew that a contract which has been acted upon will, though not under seal, be enforced by a court of equity both against and in favour of a corporation.

[CLEASBY, B. *Wilmot* v. *Corporation of Coventry* (5), where, under the circumstances, specific performance was refused, lays down the same principle.]

There was therefore a good consideration for the defendant's promise, and want of mutuality cannot be objected. But even at common law a yearly tenancy would, under these circumstances, be held to be created. *Wood* v. *Tate* (6) is directly in point to shew this, and *Doe* d. *Pennington* v. *Taniere* (7) is to the same effect.

Anstie, in reply. In *Doe* d. *Pennington* v. *Taniere* (7), the existence of the essentials necessary to create a yearly tenancy was implied from the long duration of the defendant's occupation, but that presumption is here excluded by the statements of the case. In *Wood* v. *Tate* (6), the point was not discussed, and the case, so far as it decides it, is inconsistent with the subsequent cases cited. The decisions in equity afford no answer, for it would be impossible to base on the equitable right of the defendant to claim performance of the agreement, an equitable replication to a plea denying the tenancy, which is the whole foundation of the agreement. Either party going into Chancery would have to submit to terms, and neither could obtain an unconditional injunction. Moreover, the argument, if good for any part of the contract, is good

(1) 8 Ex. 72; 22 L. J. (Ex.) 81.

(2) The Court having inquired whether there was any special provision in the acts relating to the Ecclesiastical Commissioners affecting the question, the argument was adjourned; when the case was resumed *Gates* referred to 6 & 7 Vict. c. 37, s. 6, and 13 & 14 Vict. c. 94, s. 8, as the only sections bearing upon the question; they, however, afford no assistance.

(3) 1 Sim. & St. 520.

(4) 15 Ir. Ch. 405, 420.

(5) 1 Y. & C. 518.

(6) 2 B. & P. (N. R.) 247.

(7) 12 Q. B. 998, 1013; 18 L. J. (Q.B.) 49.

for the whole; and would shew that any acts done under, and necessarily referable to, an agreement by a corporation to grant a lease, of whatever duration (since, on the principle of *Nunn* v. *Fabian* (1), they would support a bill for specific performance in equity), would, at law, support an action by the corporation, on stipulations wholly inapplicable to a yearly tenancy.

KELLY, C.B. Our judgment must be that the plaintiffs are entitled to keep the verdict they have obtained in the county court. This is an action of assumpsit brought by a corporation, on a promise to them by the defendant to deliver up certain premises in a state of repair; that promise being contained in an agreement for a demise, which was made by the defendant with the agents of the plaintiffs, and was signed by the plaintiffs' agents but not sealed with their common seal. The case is of importance, since from the statements contained in it it appears probable that, in the management of the very large estates held by the plaintiffs, there are many instances in which property has been let and occupied under agreements executed in the same informal way as the present; a matter the more to be regretted, as by 13 & 14 Vict. c. 94, provision is expressly made for the management of these estates by a committee, with power to affix the corporate seal.

It was contended, that the agreement not being under seal the corporation was not bound, and there was therefore no consideration for the promise, on which consequently no action could be maintained. The defendant, however, entered into possession and occupied till the expiration of the time stipulated for, and he afterwards continued in occupation paying the same rent, which the plaintiffs accepted, until he left under a notice to quit in March, 1868. The question is whether, under the circumstances, a tenancy from year to year did not arise in the defendant, and if this be so, then whether the stipulation as to repairs is one properly incident to a tenancy of that nature. Now, unless an equitable obligation was imposed on the plaintiffs capable of being enforced against them, and unless such an equitable obligation can be a good consideration for the promise by the other party, there is no tenancy; for a tenancy implies a contract binding on the landlord to let and the tenant to

(1) Law Rep. 1 Ch. 34.

1869

ECCLESIASTICAL COMMISSIONERS v. MERRAL.

take. But if *Wood* v. *Tate* (1) is well decided there may be a binding contract to let and to take constituting a yearly tenancy, where the instrument under which the original letting took place was not under seal, and where, therefore, unless some equitable obligation were imposed constituting a consideration, no mutuality could exist. In that case a corporation had executed a lease, but in an informal manner, and under it the tenant had entered into possession and occupied, and paid rent; under those circumstances the Court of Common Pleas held, and I think rightly held, that though the lease was originally void, yet the tenant having occupied and paid rent, the corporation were entitled to distrain. Sir James Mansfield, C.J., says (2), "The lease then being void in consequence of the blunder in the mode of its execution, is not the plaintiff tenant from year to year? And half a year's rent being now due, have not the corporation a right to distrain for that rent? That appears to me to be the plain result of all the facts stated in the case." That case is therefore a clear authority to show that when the landlord is a corporation, and the corporation have not executed under their common seal the instrument of demise, and are therefore not bound by it, yet if they allow the tenant to enter into possession, and both parties act as if there were a binding tenancy, then although neither party can maintain an action on the instrument itself, yet an implied obligation on the landlord arises, to do everything that is to be found in the instrument properly incidental to a tenancy from year to year, and a corresponding legal obligation on the tenant to pay the rent and perform such stipulations, incidental to that kind of tenancy, as the instrument purports to impose upon him.

In the first place, therefore, I am of opinion that an equitable obligation on one party will constitute a good consideration for a promise by the other, which will entitle the former to maintain an action at law against him. In the second place, that there is such an equitable obligation here is clearly proved by *Stevens' Hospital* v. *Dyas* (3), where a corporation which had entered into an agreement not under seal to grant a lease, was allowed to maintain a bill for specific performance of the agreement; they were held

(1) 2 B. & P. (N. R.) 247. (2) At page 256.
(3) 15 Ir. Ch. 405.

entitled to a performance of the entire contract, which clearly shows that an equitable obligation may be imposed on both parties, capable of being enforced by either of them, although one party is a corporation and the instrument is not under seal. On this ground there was in *Wood* v. *Tate* (1) an equitable obligation on the corporation, and that equitable obligation supported the implication of a tenancy from year to year, and gave them a right to distrain for the rent, i.e., to pursue a legal and not merely an equitable remedy. The case of *Mayor of Stafford* v. *Till* (2) is to the same effect, and is an authority to show that where possession and enjoyment has been had under a lease which was originally void, yet an action may be maintained on an implied promise which arises on the whole transaction; Best, C.J., there says, "from the fact of occupation, a promise to pay will be implied; although in an executory contract the plaintiff must rest his case upon an express promise." The learned judge then goes on, "where that is so (that is, where the contract remains executory), if one of the parties is not in a condition to enter into a promise, he cannot take advantage of a promise by the other, because there would be no mutuality in the contract;" and if there were no mutuality here there would be no contract; but there is mutuality, for as soon as the tenant entered upon the premises an equitable obligation was imposed on the plaintiffs to execute the lease, and that obligation is a consideration. Such an obligation supported the right to distrain in *Wood* v. *Tate* (1), and it is equally good to support any stipulation on the part of the tenant which could be enforced in equity. The promise by the plaintiff, therefore, which was undoubtedly made in fact, was founded on a good consideration, and can be legally enforced.

BRAMWELL, B. I am also of opinion that our judgment must be for the plaintiffs for the reasons I am about to give, and for no others. The question is whether the defendant is bound to repair. He was bound, if he was a yearly tenant to the plaintiffs at all, for in my opinion the term in question is one applicable to a yearly tenancy, and the parties have de facto agreed upon that term. The question therefore is reduced to this, whether under the cir-

(1) 2 B. & P. (N. R.) 247. (2) 4 Bing. 75.

1869

ECCLESIASTICAL COMMISSIONERS v. MERRAL.

cumstances there could be a yearly tenancy between the parties; and this is decided by *Wood* v. *Tate*. (1) The Court there decided that there was a good common law tenancy between the corporation as landlord and an individual as tenant, on common law considerations only, though without the seal of the corporation. On the authority of that case I give judgment for the plaintiffs.

PIGOTT, B. I also think on the authority of *Wood* v. *Tate* (1) that the defendant was tenant to the plaintiffs, and therefore bound to repair.

CLEASBY, B. I am of the same opinion. The only question is, whether there was a good consideration for the promise which the defendant undoubtedly made. Now the rule that governs this point is laid down in *Arnold* v. *Mayor of Poole* (2), where it is said, "It was contended that all contracts to be binding must be mutual, and that therefore, when corporations may sue upon simple contracts, it follows as a legal consequence they may also be sued. But we think the proposition as to the necessary mutuality of contracts was stated too broadly, and that it must be confined to cases where the want of mutuality would leave one party without a valid or available consideration for his promise." That is the principle on which we must decide this case; and if we look at the facts here, we see that, although the corporation could not be sued, yet the tenant in possession was not left without a remedy, for the corporation could not have turned him out. *Wood* v. *Tate* (1), where it was held that there was a tenancy from year to year although there was no demise under seal, was questioned by the counsel for the defendant on the authority of some later cases. But the question was set at rest by the judgment of Patteson, J., in *Beverley* v. *Lincoln Gas Light Company* (3), where, referring to the observations of Lord Ellenborough in *Dean and Chapter of Rochester* v. *Pierce* (4), the learned judge says, "But, call it by whatever name we please, permission or demise, it clearly binds the corporation; the party occupying and paying rent under it acquires rights from the corporation, becomes their

(1) 2 B. & P. (N. R.) 247.
(2) 4 Man. & G. at p. 896.
(3) 6 Ad. & E. at p. 840.
(4) 1 Camp. at p. 467.

1869

ECCLESIASTICAL COMMISSIONERS v. MERRAL.

tenant from year to year, and can be ejected only by the same means as would be available for an individual landlord." If then the conditions in the demise under which the tenant is in possession, operate in his favour or against the corporation and bind them, he is clearly tenant from year to year, subject to the terms of the same demise, so far as they are applicable to a yearly tenancy; and that the term in question is so applicable is decided by numerous authorities.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Jennings, White, & Buxton.*
Attorney for defendant: *Scarth.*

[IN THE EXCHEQUER CHAMBER.]

May 14.

PARKES *v.* PRESCOTT AND ANOTHER.

Libel—Publication—Distinction between Civil and Criminal Proceedings—Liability of Principal for Agent's Acts—Evidence.

The defendant P. was chairman of, and the other defendant E. was present at, a meeting of a board of guardians on an occasion when there was a discussion concerning the plaintiff's conduct, in the course of which defamatory statements concerning him were made. Reporters for the local press attended the meeting in the ordinary discharge of their duty. The defendant E., during the proceedings, said "he hoped the local press would take notice of this very scandalous case," and requested the chairman to give an outline of it. The defendant P. complied, and in the course of his statement said, "I am glad gentlemen of the press are in the room, and I hope they will take notice of it." The defendant E. added, "and so do I." The defendant P. further expressed a hope that publicity would be given to the matter. A correct but condensed summary of the proceedings, containing matter defamatory of the plaintiff, was afterwards inserted in two local newspapers. An action of libel was thereupon brought against the defendants. The declaration, to which the general issue was pleaded, charged them in two counts with publishing the reports in question, which were set out verbatim. The judge at the trial directed a verdict to be entered for the defendants, being of opinion that there was no evidence for the jury of the publication by the defendants of the libels complained of. On the argument of a bill of exceptions tendered to this ruling:—

Held (by Keating, Montague Smith, and Hannen, JJ., Byles and Mellor, JJ., dissenting), a misdirection.

By Montague Smith, Keating and Hannen, JJ. Where a man makes a request to another to publish defamatory matter, of which for the purpose he gives him a statement, whether in full or in outline, and the agent publishes

1869

PARKES v. PRESCOTT.

that matter, adhering to the sense and substance of it, although the language be to some extent his own, the man making the request is liable to an action as the publisher.

By Byles, J. There is a great difference between the authority which will make a man liable criminally for the acts of his agent, and that which will make him liable civilly. A principal is not civilly liable unless the agent's authority be by the agent duly pursued, but the principal may be criminally liable though the agent have deviated very widely from his authority.

Reg. v. *Cooper* (8 Q. B. 533), commented on.

DECLARATION: 1st count, that the defendants (Frederic Joseph Prescott and William Ellis) falsely and maliciously caused to be printed and published of the plaintiff in a certain newspaper called the *Marylebone Mercury*, the words following, "At the last meeting of the guardians of this parish, a young woman named Mary Anne Parkes, daughter of Mr. J. J. Parkes, of 17, London Street, Paddington (meaning the plaintiff), was brought before the board and examined by them, she having become an inmate of the workhouse. After hearing her statements the guardians resolved that 'admission to the workhouse having been granted to Mary Anne Parkes, the clerk be directed to write to her father, of London Street (meaning the plaintiff), informing him that the guardians will require him to pay for his daughter's maintenance during her chargeability.' To-day the following letter was read by the clerk from the young woman's father (meaning the plaintiff): '17, London Street, Paddington, February, 1868. H. Aveling, Esq. Sir,—I beg to acknowledge yours of the 7th, and say that I am glad to hear my daughter is safe, and I will call and see you relative. I am, Sir, your obedient servant, J. J. Parkes.' The chairman (meaning the chairman of the said board, and the defendant Frederick Joseph Prescott) said that considering the circumstances under which the young woman (she was twenty-two years of age) came into the house, the coolness displayed by the father (meaning the plaintiff) was something incredible. Mr. Ellis (meaning the defendant William Ellis) hoped the local press would take notice of this very scandalous case, and requested the chairman to give an outline of it. This was done by several members of the board, the following being the chief facts. The young woman it appears is of rather weak intellect, and had been residing with a relative at Brighton. She arrived in London in

consequence of something which she had heard, and went to her father's (meaning the plaintiff's) house, but was told by the servant she could not admit her. The father (meaning the plaintiff) being out, the girl went away and came back after his arrival, and again asked admission. This was most rudely and offensively refused, and she was told she might go where she liked. She consequently sought admission into the workhouse, which was granted her. The chairman said that the girl had told the board some other statements as to the offensive and cruel mode in which her father had told her to take herself off, but these he would not now repeat. A member of the board said the girl had stated that her father (meaning the plaintiff) said she was now old enough to get her living. The chairman remarked that the man (meaning the plaintiff) evidently wished to avoid paying for his daughter's maintenance, and suggested that legal proceedings should be adopted in case of his further refusal to pay. The chairman's suggestion was adopted, the whole board agreeing in stating that Mr. Parkes's conduct was 'most disgraceful, and deserved exposure,'" whereby the plaintiff's credit and reputation were injured, &c.

2nd count, that the defendants falsely and maliciously caused to be printed and published of the plaintiff in a certain newspaper called the *Paddington Times,* the words following, "Among other minutes of the board (meaning the Paddington Board of Guardians) the clerk read one relative to the admission into the workhouse of Mary Ann Parkes, aged twenty-two years, the daughter of J. J. Parkes (meaning the plaintiff), a gas engineer in a large way of business at No. 17, London Street, Paddington. The minute in question was one instructing the clerk to write to Mr. Parkes (meaning the plaintiff), informing him the guardians will require him to pay for his daughter's maintenance during the time she is chargeable to the parish. The answer to this letter is as follows: '17, London Street, Paddington, Feb. 7, 1868. Sir,—I beg to acknowledge yours of the 7th inst., and say I am glad to hear my daughter is safe, and I will call and see you relative. I am, Sir, your obedient servant, J. J. Parkes. To H. Aveling, Esq.' Mr. Wyatt (meaning one of the said guardians) asked if the young woman had misconducted herself in any way, and also whether her father (meaning the plaintiff) had actually turned her out of doors.

1869

PARKES v. PRESCOTT.

The chairman (meaning the chairman of the said board, and the defendant Frederick Joseph Prescott) said he believed the young woman had not got a very strong intellect. She was present at the last meeting of the board, and there stated that a short time ago she was living at Brighton, and returned from there in consequence of a letter which she had received from her father (meaning the plaintiff). On arriving in London she naturally expected that some one would meet her at the station, but her anticipations were not realized, and when she presented herself at her father's (meaning the plaintiff) house, the servant told her she had strict injunctions from her master (meaning the plaintiff) not to admit her, adding that Mr. Parkes (meaning the plaintiff) was not then at home. The young woman went a second time, and was refused admittance in a like manner. Mr. Wyatt (meaning the said guardian) said if the allegations were true, then Mr. Parkes (meaning the plaintiff) was nothing but a brute. The chairman quite concurred in this, and hoped publicity would be given to the matter. Mr. Gosslet, senior (meaning one of the said guardians), said it was no use parleying with such a man. The best way would be to at once summon him before a police magistrate. Mr. Chew (meaning one of the said guardians) said that one of his daughters and a sister of Mary Ann Parkes were teachers at the Craven Hill Chapel Sunday-schools, and on hearing of this occurrence he invited the sister to his house. When she came he questioned her upon the subject, and she told him her father (meaning the plaintiff) was anything but a good man, and that her stepmother was not to blame for their many domestic troubles. There was nothing whatever against the character of Mary Anne Parkes to justify her father (meaning the plaintiff) in turning her out of doors. Mr. Todd (meaning one of the said guardians) said the unfortunate young woman would have had to walk the streets all night had it not been for the kindness of Mr. Sullivan, who furnished her with an asylum in his own house. Some further conversation took place upon the subject, after which it was resolved to warn Mr. Parkes (meaning the plaintiff) that if he did not pay for the whole of his daughter's maintenance he should be proceeded against in the police court," whereby, &c.

Plea: Not guilty. Issue.

1869

PARKES v. PRESCOTT.

The cause was tried before Martin, B., at the Middlesex sittings after Trinity Term, 1868, when the reporters for the *Marylebone Mercury* and *Paddington Times* were the only witnesses called. It appeared that they had been present at the meeting in the ordinary discharge of their duty. They proved the substantial accuracy of the reports which were published by the papers they respectively represented, and which contained the libels in the first and second counts complained of, and one of them stated that he told the editor of his paper what the defendants had said before the publication. The reports were prepared from notes taken in the room. During the discussion the defendant Ellis said, "He hoped the local press would take notice of this very scandalous case," and requested the defendant Prescott, who was in the chair, to give an outline of it. This Prescott did accordingly, and in the course of his statement remarked, "I am glad gentlemen of the press are in the room, and I hope they will take notice of it," upon which the defendant Ellis added, "and so do I." The defendant Prescott also said he hoped publicity would be given to the matter.

It was objected by the defendants' counsel that there was no evidence of the publication of the alleged libels, and the learned judge being of that opinion, directed the verdict to be entered for the defendants.

To this direction the plaintiff's counsel excepted in the following terms:—"That the learned judge should not have directed the jury that there was no evidence to go to them, and should have directed the jury that there was evidence for them that the defendants intended defamatory statements should be published of the plaintiff, and that the libels which appeared were what the defendants meant should be published."

Feb. 9. *Giffard, Q.C.* (*J. C. Mathew* with him), for the plaintiff. There was evidence of publication. In Starkie on Libel, 2nd ed. vol. ii., p. 225, the rule of law is thus stated:—"All who are in any degree accessory to the publication of a libel, and by any means whatever conduce to the publication, are to be considered as principals in the act of publication: thus if one suggest illegal matter in order that another may write or print it, and that a third may

1869

PARKES v. PRESCOTT.

publish it, all are equally amenable for the act of publication when it has been so effected." Now here there was a clear invitation by the defendants to the reporters to take down defamatory matter in order to its being published.

[BYLES, J. You must go to the length of contending that there was evidence of the defendants having intended the publication of the particular libels alleged in the first and second counts.]

It is not necessary to show an authority to publish each statement separately.

[BYLES, J. The old rule was that the difference of a word between the libel alleged in a declaration and that proved at the trial, would have been a fatal variance. That is not so now, but still the evidence must establish an authority to publish the very words complained of.

MELLOR, J. It is one thing to authorize the publication of a definite defamatory statement, and another to express a hope in general terms that the press would take notice of the subject.]

The jury might possibly have found without impropriety that the publication was not proved. It is sufficient at present to shew that there was some evidence which ought to have been left to them. In *Reg.* v. *Cooper* (1), the defendant asked the editor of a newspaper "to shew K. up," and communicated to him a libellous story about K., which the editor afterwards repeated to a reporter for the paper, and this story was substantially what was published. It was held that on this evidence the jury might find that the defendant authorized the publication of the *particular* libel which appeared.

[BYLES, J. In that case the defendant subsequently recognized and approved of the article in its printed form; and two at least of the judges in the Court of Queen's Bench base their decision on this circumstance.]

It must be conceded that some identification between the matter published and that suggested must be given. But here the reporters say the reports are accurate, and that is, in the absence of evidence to the contrary, sufficient: *Adams* v. *Kelly*. (2)

Philbrick, for the defendants. There was no evidence of authority having been given by the defendants to publish the *particular*

(1) 8 Q. B. 533. (2) Ry. & Mood. 157.

libel. The reporters were there in the ordinary discharge of their duty, and in any event would have published this summary. In order to make the defendants liable, the plaintiff must shew that the reporters were their agents to publish the very words of the defamatory matter, but the evidence amounts to no more than the expression of a hope on their part that the press might take notice of the subject; and this could have been effectually done without publishing anything libellous. [He cited *Harding* v. *Greene.* (1)]

Gifford, Q.C., in reply. The defendants authorized the publication both by conduct and by language, and on the principle of *Reg.* v. *Cooper* (2), must be held responsible for the language used by the reporters. It is true that in that case there was a subsequent approval of the article as it had appeared in the newspaper, but the decision is distinctly based also on the ground of the previous authority to publish given by the defendant.

[KEATING, J., remarked that *Reg.* v. *Cooper* (2) was an indictment, and possibly, therefore, governed by different considerations from the present case.

BYLES, J. There is this distinction to be made between civil and criminal proceedings. In the former, a principal is only liable for acts done by his agent within the scope of his authority; but in the latter, the principal who instructs an agent to do something illegal which may be injurious to another, cannot qualify the wrong.

MELLOR, J. I find it laid down in Starkie on Libel, 2nd ed., vol. ii., p. 239, that "every person who maliciously lends his aid to the construction of a libel, subsequently published, or who contributes to the publication of one already made, with a knowledge of its contents, is *indictable* as a principal for the whole mischief produced."]

It is difficult to see why the same facts which constitute evidence of publication on an indictment should not also constitute such evidence in an action.

Cur. adv. vult.

May 14. The following judgments were delivered:—

MONTAGUE SMITH, J. This is an action of libel, and came before the court upon a bill of exceptions to a direction given by Baron

(1) 1 Moore, 477. (2) 8 Q. B. 533.

1869

PARKES v. PRESCOTT.

Martin to the jury on the trial of the cause, directing them to find for the defendants, on the ground that there was not sufficient evidence for their consideration of the publication of the libels.

The libels complained of were reports of certain proceedings at a meeting of the board of guardians for the parish of St. Mary-le-bone, which were published in some local newspapers. It appeared in evidence that at this meeting a discussion took place respecting the conduct of the plaintiff towards his daughter, who was then an inmate of the workhouse, and the history of the case, as stated at the meeting, in the absence (be it observed) of the plaintiff, and the remarks made upon it, were of a highly defamatory nature; indeed, the story was spoken of by one of the defendants at the meeting as a very scandalous case with reference to the conduct of the plaintiff.

The defendant Prescott was chairman of the meeting, and Ellis, the other defendant, was also present, taking part in the proceedings. Reporters of local newspapers, in which the libels appeared, attended the meeting. The following evidence was given to connect the defendants with the publication. The defendant Ellis said he hoped the local press would take notice of this very scandalous case, and requested the chairman *to give an outline of it.* This was done by several members of the board, and the chief facts were then taken down by the reporters. The defendant Prescott also said, in the course of his statement, relative to the case:—"I am glad gentlemen of the press are in the room, and I hope they will take notice of it." On which the other defendant Ellis said, "and so do I." The defendant Prescott also said he hoped publicity would be given to the matter. It was proved by the reporters that the reports published were a correct summary of what took place, and one of the reporters stated that he had told the editor of the paper what the defendants had said before the publication.

It was contended in support of the direction that the words used by the defendants did not amount to a request to the reporters to publish the proceedings, but were merely the expression of a wish or hope that they would do so, nor to an authority to publish the particular reports in the words in which they in fact appeared, and that there was no evidence to go to the jury.

1869

PARKES v. PRESCOTT.

But upon consideration of the circumstances of this case, I think there was evidence for the jury on the two questions which ought to have been submitted, viz.:—First, of a request to publish the proceedings of the meeting relating to the plaintiff's conduct, and second, that the reports contained a correct account of the proceedings as the defendants meant it should appear. There was evidence that the defendant Ellis not only said he hoped the local press would take notice of the case—but that he requested the other defendant Prescott to give an outline of it. For what purpose? Obviously for the very purpose of having the outline so given taken down by the reporters and published in the newspapers. It was further proved that, in pursuance of this request, the outline was given, and the chief facts taken down by the reporters, and afterwards put into a report. It seems to me that these facts afford evidence fit, at all events, to be laid before the jury, of a request to the reporters to publish an outline or summary of the proceedings, and, taken with the rest of the evidence, to publish their report in such a way as to shew the conduct of the plaintiff to have been disgraceful; for a disclosure to the local public of what was called the plaintiff's disgraceful conduct was the avowed object of the request made by the defendants to the reporters. There was also the clear evidence of the reporters, if the jury had believed it, that the reports were, in substance, correct.

I agree with the learned counsel for the defendants, that loose expressions of a mere wish or hope that proceedings should be published would not be sufficient to fix liability on the defendants in cases like the present. I think the words must be of such a kind, and used in such a manner, as to satisfy the jury that they amounted to, and were in fact, a request to publish. If the words do amount to such a request, and the publication be made in pursuance of it by the persons to whom it was addressed, then it seems to me the persons making such request would be responsible for the libellous matter so published. Whether the libellous matter published is in pursuance of, and in accordance with, the request, or a departure from it, and so unauthorized, would be a question to be considered on the circumstances of the particular case.

1869

PARKES v. PRESCOTT.

It is, of course, plain that if a man gives a copy of his speech to another to publish, he is answerable as a publisher. It cannot be contended that he would not be equally answerable if he desired a reporter to take down his speech as he delivered it, and to publish it. Then, can it make any difference in his liability that he requests the reporter, instead of publishing the whole speech, to make and publish an outline or summary of it? Surely, in reason and principle, there can be none where the request is acted on, and a correct outline or summary made and published.

It was strongly urged for the defendants, that they could not be liable unless they authorized the libel in the very words in which it was published. If this argument is correct, then it must follow that a man could never be liable when he desired another to make and publish an outline or summary of a speech or writing, because such an outline or summary necessitates condensation and consequent alteration of language.

But the argument cannot, as it seems to me, be correct. The man who requests another to make and publish an outline or summary of a speech, writing, or proceedings, must know that the words will be to some extent those of him who makes such summary or outline; and he must, therefore, be taken to constitute him an agent for the purpose, and be answerable for the result, subject always to the question whether the authority has been really followed. If this be not so, a man might become a libeller with impunity. Again, if the very words of the libel, and not its substance, are in these cases to be regarded, a man who gives the manuscript of a libel to an agent to print and publish would not be answerable, if by accident or negligence there were variations in some of the words, although not in the substance, of the libel.

There are few decided cases in point, but those to which we were referred are in accordance with the principles on which I think there is evidence of the defendants' liability.

In *Adams* v. *Kelly* (1) the defendant orally communicated to the reporter of the *Observer* newspaper a defamatory story respecting the plaintiff, which he said would make a good case for a newspaper. The reporter took down in writing what the defendant said, and what he so took down was, with some slight alterations made by

(1) Ry. & Mood. 157.

the editor, not affecting the sense, published. Lord Tenterden told the jury that "what the reporter published in consequence of what passed with the defendant may be considered as published by the defendant," and the plaintiff had a verdict. In this case the libel had been in some degree altered, and the very words of the defendant were not used, but the sense was preserved, and that was sufficient to fix the defendant.

In the case of *Reg.* v. *Cooper* (1) the facts were not unlike those in the present case. The defendant asked the reporter of a newspaper to "shew up" the prosecutor, and narrated to him a defamatory story, which it appeared the reporter had before heard. In that case there was no doubt evidence, which does not exist here, that the defendant had approved of the libel after it was published, by saying that he had seen it and liked it very much; and that circumstance was relied on by Coleridge, J., as the ground of his decision. Lord Denman, C.J., however, in giving judgment in that case, says (2): "If a man request another generally to write a libel, he must be answerable for any libel written in pursuance of his request. He contributes to a misdemeanour, and is therefore responsible as a principal. He takes his chance of what is to be published." This is a principle larger than is necessary for the decision of this case, for here there is evidence that the libel is a correct account of the proceedings which the defendants requested to be published.

In the result I come to the conclusion, that on principle it is correct to hold that where a man makes a request to another to publish defamatory matter, of which, for the purpose, he gives him a statement, whether in full or in outline, and the agent publishes that matter, adhering to the sense and substance of it, although the language be to some extent his own, the man making the request is liable to an action as the publisher. If the law were otherwise, it would in many cases throw a shield over those who are the real authors of libels, and who seek to defame others under what would then be the safe shelter of intermediate agents. I make this observation only with reference to the general consequences which would result from the arguments relied on to sustain the defendants' contention.

(1) 8 Q. B. 533. (2) 8 Q. B. at p. 536.

1869

PARKES v. PRESCOTT.

With regard to this particular case, it is enough to say, that in my opinion there was evidence which ought to have been left to the jury, and that, consequently, there should be a venire de novo. My learned Brothers Keating and Hannen concur in this judgment.

BYLES, J. This is a case involving principles of great importance and daily application. I therefore much regret the division of opinion between the members of the Court. It is an action for a libel. The declaration alleges that the two defendants caused to be published in a newspaper the *words following*:—(It then sets out in two counts several passages of a long newspaper report of a parish meeting containing various defamatory charges against the plaintiff.)

No evidence was given of any direction by the defendants to publish the precise words set out in the declaration, or indeed to publish any particular part of the libel either as set out in the declaration or as laid in extenso before the jury. The only direct evidence to charge the defendants with the libel was this, that they said they hoped the press would take notice of the case, and that publicity would be given to it. By comparing the parol evidence with the libel itself, it may be collected that one of the defendants said he hoped the chairman would give an outline of the proceedings. It did not appear that the defendants had ever made or seen any outline or had afterwards approved of the libel, or even seen it.

I very much doubt whether the expression of a hope that the press would take notice of the case, or give publicity to it, or that the chairman would give an outline of the proceedings, amounts to an authority to publish in a newspaper defamatory and unjustifiable matter spoken at a meeting. Suppose reporters are engaged to report at a public meeting, is any one who requests or assents to their services liable to an action of libel for a report in a newspaper, not only of what may have been said by himself, but of what may have been said by other speakers, and reported in the newspapers accordingly? But before we arrive at the solution of this novel and most important question, the common law interposes a technical difficulty.

It is not sufficient at the common law that expressions equivalent to those set out in the declaration were written and published by defendant; the libel must be proved as laid. It was at one time thought that the plaintiff need only prove the substance of a libel; but that doctrine was overruled in Lord Mansfield's time (see *Rex* v. *Berry*) (1), and it is now clear law that the words of a libel must be set out in the declaration, and must be proved as laid. A variance is fatal. It is true a variance is now amendable; but no amendment was here asked for or made, or could be made so as to cure the objection, that the evidence does not shew what particular facts or what particular defamatory expressions were or were not authorized by the defendants. And this is not an objection of form, but of substance; among other reasons, for this, that the sting of a libel may be sheathed in the particular instances of misconduct imputed in the libel, or even in the particular expressions used. Take the case of oral slander—an extreme case, it is true, but extreme cases test principles; suppose A. in general terms, without specifying any particular accusation, should desire B. to defame C., and B. accordingly speaks and publishes the words "C. is a murderer," can A. be sued in an action wherein the declaration should allege that he spoke and published the words "C. is a murderer"? But it does not follow that C. has no remedy against A. It may well be that A. in the case supposed would be liable to a special action on the case at the suit of C. for inciting B. to defame C., and I see no reason why the originator of a libel may not be reached in the same manner.

The counsel for the plaintiff were, therefore, in the argument before us asked by me for authorities to prove that a man could be liable in a civil action for a particular libel, the words of which he had neither written nor dictated, nor spoken beforehand, nor himself published nor assented to afterwards.

Two cases only have been brought under our notice, *Adams* v. *Kelly* (2), and *Reg.* v. *Cooper*. (3) But in *Adams* v. *Kelly* precise instructions were given and taken down in writing for the insertion of the particular defamatory expressions used in a particular newspaper, the *Observer*, and Lord Tenterden insisted on those precise

(1) 4 T. R. 217. (2) Ry. & Mood. 157.
(3) 8 Q. B. 533.

1869

PARKES v. PRESCOTT.

instructions being laid before the jury. The only other case cited was a criminal case, *Reg.* v. *Cooper*. (1) But in that case it was shewn that after the libellous article came out the defendant had seen it, and had expressed his approbation of it. That case was, moreover, a criminal case. It was an indictment for a libel; and there is a great distinction between the authority which will make a man liable criminally and the authority which will make him liable civilly.

A principal is not civilly liable for the acts of his agent, unless the agent's authority be by the agent duly pursued; but the principal may be criminally liable though the agent have deviated very widely from his authority, or, as Lord Bacon puts it (Bacon's Maxims, 16), "Lawful authority is to receive a strict interpretation, unlawful authority a wide and extended interpretation. Mandata licita recipiunt strictam interpretationem, sed illicita latam et extensam." Lord Bacon proceeds to comment on this maxim, and says: "In committing of lawful authority to another a party may limit it as strictly as it pleaseth him; and if the party authorized doe transgress his authority, though it be but in circumstance expressed, yet it shall be void in the whole act. But when a man is author and monitor to another to commit an unlawful act, then he shall not excuse himself by circumstances not pursued." This distinction Lord Bacon proceeds to illustrate by examples. Thus he says: "If a man command J. S. to kill J. D. on Shooter's Hill, and he doth it on Gad's Hill, or to kill J. D. by poison, and he doth it by violence, in these cases, notwithstanding the fact be not executed, yet he is accessory nevertheless." And he goes on to shew that a man cannot impose a condition on an unlawful act. "As if a man bid J. S. to steal in a house, and especially restrain him from so doing except when he can get in without breaking; but J. S. breaks into the house, and steals, yet the principal is accessory to the burglary; "for," says Lord Bacon, "a man cannot condition with an unlawful act, but he must at his peril take heed how he putteth himself into another man's hands." It is true that a libel is a criminal act, but in this case the plaintiff does not proceed for the criminal act, but for the civil injury. Reading the case of *Reg.* v. *Cooper* (1) with the light

(1) 8 Q. B. 533.

1869

PARKES v. PRESCOTT.

of this distinction between civil and criminal proceedings, which distinction is clear law and sound sense, it may well be that when a defendant tells the editor of a newspaper, as he did in that case, to "shew another up," and the editor of the newspaper does so in gross terms, unauthorized and not intended by the defendant, the latter may, nevertheless, be criminally liable, though he might not be civilly liable.

Besides, in misdemeanours although all who procure, abet, assist, or assent are principal misdemeanants, yet the judge may apportion and restrain the punishment to the real demerits of each delinquent. But in a civil action the object is damages, which cannot be apportioned among the defendants. But all who remain on the record must be liable for the whole amount, and neither of the defendants in this action are liable except for what both authorized.

These considerations lead me to the conclusion that the learned judge was right in directing the jury to find a verdict for the defendants.

MELLOR, J. (1) The question in this case arose on a bill of exceptions to the ruling of Baron Martin on the trial of an action of libel, brought by the plaintiff against the defendants for falsely and maliciously causing to be printed and published certain libels in newspapers called the *Borough of Marylebone Mercury*, and the *Paddington Times*, of and concerning the plaintiff.

The plea was not guilty. The libels in question consisted of reports of what took place at a meeting of the board of guardians of the parish of Marylebone, respecting the case of a girl named Mary Ann Parkes, the daughter of the plaintiff, and of the observation of various members of the board at such meeting relating thereto.

The libel complained of was furnished to the newspapers in question by reporters, who were accidentally present in the course of their duty and who reported the proceedings, as articles of news, to the respective newspapers. It was not alleged that the report was approved or seen by the defendants. It was proved that the defendant Prescott was in the chair at the meeting, and that Ellis, the other defendant, was present. The report in question

(1) This judgment was read by Hannen, J.

1869

PARKES v. PRESCOTT.

was a summary of what took place at such meeting. The defendant Ellis, in the course of the discussion, said he hoped "the local press would take notice of this very scandalous case," and requested the other defendant Prescott to give an outline of it. The defendant Prescott, in the course of a statement to the guardians of the case, said, "I am glad gentlemen of the press are in the room, and I hope they will take notice of it," upon which the other defendant Ellis said, "and so do I," and further the defendant Prescott said he hoped "publicity would be given to the case." The counsel for the plaintiff having proved that the libels in question contained a correct summary of the proceedings by calling the two reporters, stated that he had no further evidence to offer in support of the defendants' liability; whereupon the counsel on the part of the defendants insisted that, in the absence of further evidence, "there was not sufficient evidence to go to the jury in support of the issue above joined."

Baron Martin thereupon declared his opinion to the jury that the several matters so given in evidence were not sufficient evidence to go to them, and directed them to find a verdict for the defendants. Upon the question thus raised upon the bill of exceptions for our determination, I am of opinion that Baron Martin rightly directed the jury to find a verdict for the defendants.

It is to be observed that the two reporters were not taken to the meeting of the board of guardians by the defendants, but were present there in the course of their duty to report matters of interest to the inhabitants of the district in which the newspapers in question circulated. They exercised their own discretion as to what they would report, and they proved that each report in question contained a summary only of the proceedings and observations of the various guardians present. Neither summary was seen by either of the defendants, who were entirely ignorant of the mode in which the reporters might, in their discretion, deal with the proceedings and observations made at the meeting. It appears to me that it would be most pregnant with mischief, if every speaker at a meeting, at which reporters for the public press may be present, could be made responsible by indictment or action for what reporters chose in their discretion to report in a summary of the proceedings, because he happened to say that he hoped that the

press would take notice of the case, or would give publicity to the matter, or any similar expression. In spoken slander the defendant is only liable for his own expressions; but if the plaintiff should succeed in this action, it would tend to confound the well-settled distinction between oral slander and libel, and would make a man responsible not for his own expressions only, but for all the observations made by any other person who might be present at such meeting. I think that, in order to make a man responsible for a report printed and published by a third person, it ought to be shewn that he had seen or heard or dictated the report itself, or approved of the libellous statements therein.

There are but few cases which bear upon this subject, and the one mainly relied upon, by the counsel for the plaintiff, was *Reg.* v. *Cooper* (1), in which Lord Denman, C.J., is reported to have said that (2), "if a man request another, generally, to write a libel, he must be answerable for any libel written in pursuance of his request; he contributes to a misdemeanour, and is therefore responsible as a principal." It is to be observed that Wightman, J., who tried the case, and Coleridge, J., placed their judgments on the special circumstances of the particular case, and indirectly declined to approve the large proposition asserted by Lord Denman. Coleridge, J., said (3), "I agree on a very short ground. The question is, whether there be evidence that the defendant approved of *this*, not *a*, libel." And again, "I do not put the argument beyond this, that materials are furnished. Then complaint is made that the expected publication does not appear; that perhaps may not carry the proof much farther. But when it does appear the defendant gives judgment against himself by approving of it." And Wightman, J., said (3), "It appeared to me proper to be left to them whether on the evidence they believed that this libel was what the defendant meant to be published. It would be very dangerous to allow a man to direct a libel to be published on a particular subject, and *after he has approved of* what is published, to defend himself on the ground that something has been added to his original communication." In that case the evidence shewed that the defendant had expressed to the editor of the newspaper his

(1) 8 Q. B. 533. (2) 8 Q. B. at p. 536.
(3) 8 Q. B. at p. 537.

1869

PARKES v. PRESCOTT.

desire that he would "shew up" the prosecutor, and then told him the story, and after the interview, when the libel appeared, the defendant told the editor that he had seen it and "liked it very much."

The facts of that case are entirely different from the present, and it certainly cannot be said to be an authority in favour of the plaintiff in this case, except so far as the obiter dictum of Lord Denman is concerned, and that appears to have arisen out of the argument as applied to the particular facts of that case. The case of *Adams* v. *Kelly* (1), also cited for the plaintiff, does not really maintain the contention of the counsel for the plaintiff. In that case the editor of a newspaper had published with slight alterations, not affecting the sense, a written statement from his reporter, the contents of which had been communicated to him by the defendant for the purpose of such publication, and under such circumstances it was rightly held that the defendant would be liable. These cases, when the facts of them are carefully considered, fall far short of the proposition of the counsel for the plaintiff in the present case.

I think that, in order to support the allegation that the defendants caused to be printed and published the libels set out in the declaration, there ought to have been evidence of a communication, either verbal or written, of the entire substance of the libel to the reporter, as the libel to be published, or that either before or after the publication thereof, the defendants sought to be charged, saw and approved of the particular libel; and that, inasmuch as in the present case, the expressions used only indicate a wish that gentlemen of the press present would notice the case, or call attention to it, or give publicity thereto, leaving the mode and manner to the absolute discretion of the reporters, I am of opinion that my Brother Martin was justified in holding the evidence not to be sufficient to be submitted to the jury in support of the issue joined upon the pleadings.

Venire de novo.

Attorneys for plaintiff: *Pemberton & Reeves.*
Attorneys for defendants: *Roche & Gover.*

(1) Ry. & Mood. 157.

COURTAULD *v.* LEGH. 1869

May 6.

Practice—Error—Case stated by Arbitrator.

An arbitrator to whom a cause was referred, was required by the order of reference to state a case for the opinion of the Court of Exchequer, at the request of either party; he stated a case accordingly, which was heard and decided by the Court:—

Held, that this decision was not a judgment on which error could be brought. *Gumm* v. *Fowler* (2 E. & E. 890; 29 L. J. (Q. B.) 189), followed.

RULE to set aside an order of Mellor, J., confirming an order of the Master, by which the defendant's proceedings in error in this cause were set aside.

By an order of reference, which was made by consent, this cause was referred to an arbitrator, and it was ordered that the arbitrator "shall, if required by either of the said parties, state a special case for the opinion of the Court of Exchequer of Pleas, and judgment shall be entered according to the opinion of the said Court;" and further, that "neither the plaintiff nor the defendant shall bring or prosecute any action or suit at law or in equity against the said arbitrator, or bring any writ of error, or prefer any bill in equity against each other, of and concerning the matters so as aforesaid referred."

The arbitrator having stated a case accordingly, and judgment having been given thereon for the plaintiff (1), the case went back to the arbitrator to make his award. The award not having been yet made, the defendant brought error.

Garth, Q.C., and *Thesiger*, shewed cause. This is not a special case within s. 32 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125); no final judgment has been given, but the whole is still under the hands of the arbitrator; therefore no error can be brought. Moreover, the words of the order of reference take away the right to bring error.

THE COURT called on

Pollock, Q.C., and *Thrupp*, to support the rule. The case is within the words of the 32nd section. In *Gumm* v. *Fowler* (2) it

(1) Ante, p. 126. (2) 2 E. & E. 890; 29 L. J. (Q.B.) 189.

1869

COURTAULD v. LEGH.

was held that error could not be brought upon a case stated by an arbitrator to whom a cause had been referred; but the circumstances of that case differed from the present. Here the questions of law and fact are separated by the order of reference; the arbitrator is bound at the request of either party to state a case, and he must make his award in accordance with the judgment pronounced.

KELLY, C.B. This rule must be discharged. The parties have referred the cause to an arbitrator, whose award is, as is manifest upon looking at the order of reference, to be final and conclusive between them. Incidentally, however, to the power thus given him, he is empowered, and indeed compelled, at the request of either party, to state a case for the opinion of this Court. He has done so, and the Court have delivered their opinion, but that opinion is not, properly speaking, a judgment of the Court. An infallible criterion is, to consider whether, upon that special case, judgment could be entered up and execution issued. It is clear that it could not. The action, which is for infringing an alleged right of property, is referred to the arbitrator, who is to determine whether the plaintiff is entitled to maintain it, and what damages, if any, he is entitled to recover. (1) Both these are questions for the arbitrator, and he has not pronounced his decision upon either. The Court had only to determine the particular question submitted to them, and this determination is ancillary to further proceedings before the arbitrator, who is ultimately to make a final determination on the whole matter, and who may make his award in favour of either the one party or the other. The judgment of the Court is therefore only an intermediate step in the proceedings, without any of the form or effect of a true judgment, and is, therefore, not a proceeding upon which error can be brought.

MARTIN, B. I am of the same opinion. This is not a special case within the meaning of the 32nd section; and the case of *Gumm* v. *Fowler* (2) shews that to be so. It is a mere step in the arbitration, and the ultimate judgment in the cause is to be entered as the arbitrator may think fit.

(1) See ante, p. 126. (2) 2 E. & E. 890; 29 L. J. (Q.B.) 189.

6 Jur. (N.S.) 1093

BRAMWELL, B. I am of the same opinion, upon the ground that no final judgment has been entered up, and that till this is done, proceedings in error cannot be taken. It is a fact clear beyond all controversy, and obvious to every one, that there is as yet no final judgment. When there is, it will appear that there are two further difficulties in the way, as to which I pronounce no judgment; first, that this is not a special case within the meaning of the 32nd section; and secondly, that the parties have expressly agreed not to bring error; but if after final judgment were signed they took this proceeding, they would be bringing error.

PIGOTT, B. I am of the same opinion. First, there is no final judgment; and, secondly, the parties have by agreement together selected their own tribunal, and must stand by its decision.

Rule discharged.

Attorneys for plaintiff: *Wilde, Humphrey & Co.*
Attorneys for defendant: *Hathaway & Andrews.*

FREEMAN *v.* JEFFRIES.

May 6.

Action for Money had and received—Mistake—Valuation—Award.

By agreement between the outgoing tenant of a farm (the defendant) and the incoming tenant (the plaintiff), the amount to be paid by the plaintiff to the defendant was referred to two valuers, who made their valuation. A promissory note for the amount of the valuation (after deducting 2000*l.* paid on account) was given by the plaintiff to the defendant; and the plaintiff entered into possession. On the occasion of his selling his interest in the farm to a third person, the plaintiff discovered that errors had been made in the former valuation, by including items that ought not by the custom of the country to have been valued to him, and items that did not exist. He nevertheless paid the promissory note at maturity without objection. Afterwards, without having given the defendant any information as to the nature of his complaint of the valuation, and without having made any demand, he brought this action for money had and received:—

Held, by the Court, that the plaintiff could not recover.

By Kelly, C.B., and Martin and Pigott, BB., that the valuers' award was final between the parties.

By Kelly, C.B., and Martin, B., that the conduct of the plaintiff had made it impossible to restore the parties to their original condition or to do justice between

1869

FREEMAN v. JEFFRIES.

them, and that therefore the plaintiff could not maintain an action for money had and received.

By Martin and Bramwell, BB., that to enable a plaintiff to maintain an action for money paid by mistake, as money had and received by the defendant, notice of the mistake must have been given to the defendant and a demand made.

ACTION for money had and received. Plea: Never indebted. Issue.

The plaintiff being about to become tenant of a farm held by the defendant under a lease which would expire in the following year, the plaintiff and defendant on the 17th of July, 1868, entered into an agreement in the following terms:—

"First, the said J. S. Jeffries, by and with the consent of Sir George Broke Middleton (the landlord), has conveyed and assigned, in consideration of the sum of 2000*l.*, unto the said T. Freeman all his interest in the farm known as Alnesbourne Priory, &c., together with all the growing crops as now standing upon the land, or as already harvested and secured, all the covenants and general valuation of the farm, all the live stock consisting of the flock of black-faced ewes, twenty-five scores, not more than three and a half scores to be crones, and sixteen agricultural horses, also all the dead stock as generally used upon the said farm."

Secondly, the defendant was to harvest the crops, pay rent, &c., till Michaelmas, and if he should be prevented from fulfilling his contract was to refund the 2000*l.* already paid with interest. "It is further agreed between the said J. S. Jeffries and the said T. Freeman, all the aforesaid matters and things are to become a subject of valuation by two indifferent persons, one to be chosen by each party, and in the event of their not agreeing, then by their referee or umpire, whose decision shall be final and binding on both parties. It is further agreed between the aforesaid parties that after the valuation is made and the award prepared, the remainder of the money shall be made payable to the said J. S. Jeffries on the 1st day of November next by note of hand."

The 2000*l.* was paid at the time of making the agreement; the valuers named by the parties completed their valuation, which was handed by the defendant to the plaintiff on the 21st of July; and with the valuation, which was for a lump sum, there was also given to the plaintiff an inventory of the items valued. On the

23rd of July the plaintiff and defendant went over to the farm, and on their return the plaintiff gave the defendant his promissory note, payable on the 1st of November, for 3319*l.*, the difference between 5319*l.* the amount of the valuation, and 2000*l.* the sum paid down on signing the agreement.

The plaintiff remained in possession of the farm till the following Michaelmas, and then sold his interest in it to a Mr. Packard. On the occasion of the sale the farm was revalued. It was then discovered (as the plaintiff alleged) that several items had been included in the valuation to him which ought not to have been so included; but no complaint whatever with respect to the valuation was made by him to the defendant until the end of October, and then no intimation was given of the nature of the grievance complained of.

On the 1st of November the plaintiff paid the amount of his promissory note to the defendant, in whose possession the note had remained without being negotiated, and in December commenced this action.

At the trial before Bramwell, B., at the Essex spring assizes, 1869, evidence was given to the effect that certain items had been improperly included in the valuation to the plaintiff. These items were of two sorts, of each of which certain specimen items were taken as representative. The first specimen item was "groundage," an allowance made in some districts by the custom of the country to the outgoing tenant, in consideration of his not feeding or turning stock on to land sown with young seeds, but which, it was alleged, was not allowed by the custom of the country where the farm was situated. The second item was "pea stubbles, 25*a.* 3*r.* 33*p.* tillage and seed to same;" as to this it was said that the same thing was charged twice over, once as tillage and seed, and afterwards as a crop. A verdict was taken for the plaintiff, with leave to the defendant to move to enter a verdict for him, the amount to be ascertained by an arbitrator, in case the judgment of the Court should be in favour of the plaintiff. A rule having been obtained accordingly,

J. Brown, Q.C., Sir George Honyman, Q.C., and *Finlay*, shewed cause. The valuers have in fact made no valuation, for they have valued that which was not referred to them to value. If in an action

1869

FREEMAN v. JEFFRIES.

for the valued amount, this valuation containing the items objected to were treated as an award, and set out in a plea with proper averments (Chitty on Pleading, vol. iii. p. 189 (*n*) 7th ed.), the plea would be good, for it would appear that the valuation contained some items which ought never, according to the custom of the country, to have been included at all, and which therefore were not referred to the valuers, and other items which did not exist upon the farm, and which were equally excluded from valuation: *King* v. *Bowen* (1), *Beckett* v. *Midland Railway Company*. (2) The valuers have therefore exceeded their authority, and the whole proceeding is a nullity. But if this is so, then the money, which was paid in the belief that a valuation had been actually made, was paid under a mistake of fact, and can be recovered back in this form of action. The injustice, if the valuation were taken as conclusive, would be great and irreparable; but if the plaintiff succeeds the defendant is not left without a remedy, for he can bring an action for the value of his interest on a quantum meruit, or may perhaps set off his claim in reduction of damages: *Leeds* v. *Burrowes*. (3)

[KELLY, C.B. Could the valuers have made a new valuation after the mistake had been discovered, supposing it on other grounds possible, or were they functi officio?]

Having as yet made no valuation they had not discharged their functions.

[MARTIN, B. Were not the valuers arbitrators to determine the custom of the country, and to apply it?]

It was rather a valuation than an arbitration; the power of the valuers was only to fix a price on certain limited things; *Bos* v. *Helsham*. (4)

[PIGOTT, B. The effect of your argument is, that if a single article, of however small a value, were either omitted or included wrongly, the whole transaction could be reopened.]

It is not necessary that the whole consideration should have failed in order to entitle the defendant to maintain an action for the sum paid, *Cox* v. *Prentice* (5); and even where the consideration has been actually received and dealt with and disposed of

(1) 8 M. & W. 625.
(2) Law Rep. 1 C. P. 241.
(3) 12 East, 1.
(4) Law Rep. 2 Ex. 72.
(5) 3 M. & S. 344.

by the plaintiff, so that the defendant cannot be restored to his position, the plaintiff may recover back any excess in the payment, as on a partial failure of consideration: *Devaux* v. *Conolly*. (1) If it be necessary, the present case may be so treated; the valuation is divisible, and being as to part good and as to part bad, to the extent to which it is bad the consideration has failed: 1 Wm. Saund. 33, 33a., note to *Birks* v. *Trippet*.

[MARTIN, B. Suppose the plaintiff had been sued on the promissory note, what defence could he have made?]

Possibly none, unless, on the principle of *Forman* v. *Wright* (2) and *Agra & Masterman's Bank* v. *Leighton* (3), the sums were considered so far ascertained that partial failure of consideration could be pleaded.

[BRAMWELL, B. Granting that this unliquidated sum could be made a debt in the defendant, or that even the whole was paid under such circumstances that the plaintiff was entitled to claim repayment, how could it be a debt in the defendant until the plaintiff gave him notice to hold it for him? How could there be any duty on the defendant to repay it, until he knew of the fact which gave the plaintiff the right to repayment, or at least, until the plaintiff made a demand upon him? *Wilkinson* v. *Godefroy*. (4)]

No notice or demand is necessary where the debt arises from the facts of the case or from a mistake, for the debt is constituted by those facts themselves: Com. Dig. Pleader, C. 69, 70, Condition, L. 9. This is not like the case where notice is required by reason that the act which is the condition of the obligation is to be done by the plaintiff himself, and is therefore within his peculiar knowledge, as in *Vyse* v. *Wakefield*. (5) If that principle were adopted in this class of cases the Statute of Limitations would only run from the demand or notice, and not, as it must, from the occurrence which created the debt: *Bree* v. *Holbech*. (6) There is here nothing in the knowledge of the plaintiff that was not equally in the knowledge of the defendant, and the defendant being the per-

(1) 8 C. B. 640.
(2) 11 C. B. 481; 20 L. J. (C.P.) 145.
(3) Law Rep. 2 Ex. 56.
(4) 9 A. & E. 536.
(5) 6 M. & W. 442.
(6) 2 Dougl. 655.

1869

FREEMAN v. JEFFRIES.

son on whom the obligation lay to return the money, he was the person bound to know.

[BRAMWELL, B. Provided any obligation lay upon him at all until he knew. But suppose the plaintiff brought trover or detinue for the promissory note, could he have maintained it without a previous demand?]

That would have been an action for property, and the tortious act could not be proved without some evidence of a holding against the will of the owner; but here the facts of the original transaction constitute the debt. *Standish* v. *Ross* (1) shews that the fact, that the defendant cannot be replaced in his former position, does not take away the plaintiff's right to recover. They also cited *Hirst* v. *Tolson*. (2)

Hawkins, Q.C., and *Philbrick*, in support of the rule, were not called upon.

KELLY, C.B. [after stating the facts of the case and the terms of the agreement, proceeded]:—The plaintiff brings this action to recover either the whole sum of 5319*l.*, or the 2000*l.* paid on deposit, or the remaining 3319*l.*, or an undefined sum which the jury may find to be the value of those items which ought not to have been included in the valuation. At the trial various items were specified and agreed upon, which were admitted, or which were to be assumed, to represent fairly the plaintiff's objections. These items are of two kinds. The first are those which, by the custom of the country, ought not to be included in the valuation. This raises the question whether, under the agreement, power was not given to the valuers to determine what the custom of the country was, and to apply it to the circumstances. In my opinion they had that power. If, then, we were to suppose a jury satisfied that some items were included which ought by the custom to have been excluded, yet the plaintiff cannot recover, for the question was left to the determination of the valuers, whose decision was final.

The second class of items may rest on a different principle. Here it is said the valuation contains cumulative charges, one for a crop, and another for the seed from which it was raised. It may even here, however, be doubtful whether the question is not one of the custom

(1) 3 Ex. 527. (2) 2 Mac. & G. 134; 19 L. J. (Ch.) 441.

1869

FREEMAN v. JEFFRIES.

of the country, and one therefore falling within the same principle as the first. But, assuming it to be otherwise, it is still a question whether, on a view of the fields and what was growing there, the valuers were not at liberty to consider whether both stubble and seed should not be included in the valuation. Therefore, looking at the nature of the items, and admitting that there may have been others of larger amount but of the same character, it is not competent to the plaintiff to object to the valuation; but the determination of the valuers is conclusive against him, as it was against the defendant. On these grounds I am of opinion that the rule must be made absolute.

But I must add that if the case were, as was put in argument, that the valuers had manifestly included something which they had no jurisdiction, right, or power to include, as, for instance, a field of several acres with a crop of wheat upon it belonging to another owner, I think the action would still, under the circumstances, not be maintainable. For we must in this action consider the conduct of the parties before, at the time of, and after, the valuation, the acts done between the two, and the acts done separately by the plaintiff and not communicated to the defendant. Everything goes on regularly till the 21st of July, when the defendant produces the inventory and valuation, and delivers it to the plaintiff, who accepts and receives it. On the 23rd the parties go together over the farm, when the plaintiff might have compared the inventory with the stock and crops, and seen whether it contained anything which ought not to have been included. But he did not do so. He accepted the inventory and delivered to the defendant the promissory note for the amount of the valuation according to their agreement. Now if a question had then been raised as to the correctness of the valuation, and an error had been discovered, steps might have been taken to rectify it before the condition of the parties was altered. But the plaintiff having received the inventory, and with full means of inquiry, offers no objection and makes no inquiry, but takes possession of the farm, stock, and crops. Here again he had an opportunity of going through the valuation on the spot; but he does not do so; and it is not until after he has paid the promissory note on its becoming due in November, that, having previously, and on the occasion of his

1869

FREEMAN v. JEFFRIES.

selling his interest in the farm, discovered, as he alleges, that a mistake had been made in the valuation, he commences this action. Now, suppose a mistake had been made in fact, and that too of an important kind, such as that a field not belonging to the farm had been included, the plaintiff's duty would have been to go at once to the defendant and claim a deduction, and (as the items had not been separately estimated) that the valuers should revise the inventory and valuation, and determine how much ought to be allowed. I put the question to Mr. Brown whether the valuers, having once made their valuation, were functi officio, or whether it was still open to them to make a new valuation. He agreed that if the valuation, on such a ground, was erroneous, the valuers would be entitled to make a new valuation, and the true and correct amount being thus ascertained, the excess, he contended, and perhaps with reason, might be recovered back. This, however, was not done in fact. No notice was given to the defendant or to the valuers of any alleged error, nor was any opportunity afforded him or them of examining into the matter. On the contrary, the defendant was led to believe, and did believe, that the valuation delivered was a correct, final, and conclusive estimate, and he received no notice to the contrary until after the promissory note had been paid, and it was impossible to reinstate the parties in their previous condition. Clearly, then, the plaintiff cannot recover back the whole sum of 5319*l.*; nor can he recover the 2000*l.* paid on deposit, for it was paid, not under the valuation at all, but in pursuance of the agreement. Can he then, thirdly, recover back the 3319*l.*, or that sum whatever it was which he paid, as he alleges, under a mistake? Certainly he cannot. Assuming even (though without conceding it) that the valuation was incorrect and void, and that, if the money had not been paid, an action against the plaintiff for the 3319*l.* must have failed, yet the plaintiff cannot, under the present circumstances, recover; for, in the first place, it was paid, not in consequence of the valuation alone, nor because a specific sum was fixed by the valuation; but the consideration for it was the sale and delivery of the farm, stock, and crops, which having been, in fact, delivered over to the plaintiff, and being in his actual possession, no such failure of consideration has taken place as will entitle him to recover the sum

1869

FREEMAN v. JEFFRIES.

paid, as if a mistake had been committed applying to the whole matter. This is an equitable action, and will only lie when it is inequitable in the defendant to retain the money which the plaintiff claims; but, so far from that being the case here, it would be most inequitable to allow the plaintiff to take it away. The plaintiff was bound before he could call on the defendant to repay any money at all, and whilst it was yet practicable to correct the alleged error, to give full notice of it to the defendant, and afford him the opportunity of investigating the claim and rectifying the valuation. It was in his power to do so, for he was still in possession of the farm. But having thus the means of bringing the question between himself and the defendant to a just and satisfactory settlement, he gives no intimation of any objection to the valuation, allows the defendant to suppose that the matter is concluded, and then, with full knowledge of all the circumstances on which he now founds this action, he parts with the farm, thus rendering it impossible for the valuers or the defendant, or himself even, to enter the farm and inspect the stock and crops for the purpose of reconsidering the valuation. He pays the promissory note, still without objection, and finally, and without a demand made, in December he commences this action. It is therefore not inequitable for the defendant to retain this money, for he has received it bonâ fide as the price of the stock and crops which he has delivered over to the plaintiff according to his agreement, and of which he has no means of repossessing himself.

It appears to me, therefore, that this case does not come within the principle upon which the action for money had and received, to recover money paid by mistake, is maintainable. That principle is clear and simple in the extreme. No man should by law be deprived of his money, which he has parted with under a mistake, and where it is against justice and conscience that the receiver should retain it. If A. pay money to B., supposing him to be the agent of C., to whom he owes the money, and B. be not the agent, it may be recovered back again. If A. and B. are settling an account, and make a mistake in summing up the items—A. pays B. 100*l.* too much—he may recover it back again. So, exempli gratiâ, in one of the many decided cases on this point, where an attorney's clerk had paid a sheriff 10*s.* 6*d.* demanded as of right for three

1869

FREEMAN v. JEFFRIES.

warrants, believing that sum to be due, and 4*d.* for each warrant only was the proper sum, the attorney was held entitled to set off the difference, as money had and received in an action brought against him by the sheriff: *Dew* v. *Parsons.* (1) But in all these cases, not only was the money paid under a mistake by the party paying it; but the retaining of the money by the receiver was against equity, justice, and good conscience. Here, however, there was no mistake on the part of the plaintiff. He paid the amount at which the valuers had in truth and in fact assessed the property valued: and the mistake, if any, was theirs, and he and not the defendant had the means of enabling them to rectify their error. On the other hand, not only was it not against equity and good conscience in the defendant to retain the money, at least until the account could be fairly adjusted between him and the plaintiff, but it would have been manifestly unrighteous and unjust that the plaintiff, having received possession of the property for which the money had been paid, having sold it for a large sum of money which he had also received, and thus knowingly deprived himself and the defendant of the means of rectifying any error which might have been committed, or of reinstating themselves in their original condition, should be permitted by law to recover back the money he had so paid, thus taking to himself at once the property and the price of it, and leaving the defendant to his legal remedy, after depriving him of all means of practically enforcing it.

Further, it appears that the promissory note was still in the hands of the defendant at the time of the payment of the money by the plaintiff in November; and inasmuch as the plaintiff then had full knowledge of all the facts of which he alleges that he was ignorant when he gave the promissory note, and upon his ignorance of which his present claim is founded, I am of opinion that this was a voluntary payment made with knowledge of all the facts, and on that ground also the money cannot be recovered back in this action.

For these reasons I think that the verdict for the plaintiff should be set aside, and the rule made absolute to enter the verdict for the defendant.

MARTIN, B. I also think this rule must be made absolute. It

(1) 2 B. & A. 562.

1869

FREEMAN v. JEFFRIES.

is clear this action is not maintainable without a demand, that is, an intimation from the plaintiff to the defendant that the money which has been paid was paid under such circumstances as render a part or the whole recoverable back. I think this is clear, and I am prepared to give judgment on this point alone. The action is at common law; and I only know of two kinds of common law actions; one for injury to person or property, and the other for breach of contract. Now, the ordinary case of breach of contract is, where both parties have agreed to a certain thing, and one breaks the promise which he has made. But for a long time implied contracts have been admitted into the law, where, a transaction having taken place between parties, a state of things has arisen in reference to it which was not contemplated by them, but is such that the one party ought in justice and fair dealing to pay a sum of money to the other. Now, a state of circumstances has (it must be assumed) arisen here which was not in the contemplation of either party, and which it is insisted raises an implied contract in the defendant. To judge whether this is so we must look at the circumstances. The parties have entered into an agreement for the sale of the defendant's interest in the farm, stock and crops, for an entire sum to be put on it by two valuers, and of which 2000*l.* was paid down. It was the duty of the valuers to determine what was, according to the custom of the country, to be paid by an incoming to the outgoing tenant. They had no difference requiring the appointment of an umpire, but make an award, as to which it is ridiculous to suppose that any extravagant or considerable error has been committed and passed over by the plaintiff's valuer against the interest of his employer. A promissory note is given for the amount of the valuation according to the agreement, and is paid; the plaintiff enters into possession of the farm; he again sells his interest, and so ceases to be able to return to the defendant what he had got from him; and now, the valuer on this sale having discovered what he thinks to be a mistake (and what we must suppose to be such) in the former valuation, the plaintiff without notice brings an action against the defendant to recover the whole sum which he has paid under that valuation. We are asked to treat the whole affair as a nullity, and are told that this is the essence of justice. But the

1869

FREEMAN v. JEFFRIES.

effect contended for could only be produced by a rescission of the contract, and the contract cannot be rescinded unless the parties can be restored to their original condition. But if one party has done an act by reason of which it has become impossible to put the other in the same situation as before, there can be no rescission, and the remedy, if any, must be on the contract. It is contended that under these circumstances, a contract will be implied to return the money; but I am not of that opinion. If an action lies for recovering the money paid for those items which ought not to have been included in the valuation, it would be an action for the return of a portion of the money paid, on the ground that the consideration had failed, and after notice given that it had failed. But unless some communication has been made by the plaintiff, he is not entitled to recover either the whole or any part of this sum. On the ground, therefore, that the plaintiff is not in a position to sue without having made a demand on the defendant, I am of opinion that this rule must be made absolute.

BRAMWELL, B. I give no opinion on many of the questions which have been discussed; but on the ground I am about to mention I think this rule must be made absolute. The plaintiff's case is this: "I have paid money which I was not bound to pay, and which, if I had known facts which I now know, I should not have paid. I paid it on the footing of a valuation having been made, when, in fact, no valuation had been made; neither a valuation including in distinct items the matters which were to be valued, nor a valuation in general of the whole of the items for which I ought to pay." But if the plaintiff were under the circumstances entitled to be repaid the sum he claims, he ought to have given notice to the defendant of the facts by reason of which he was so entitled; because until he did so there could be no duty on the defendant to pay it over. Put the claim of this action, which is in the technical form of an action for money had and received, in a rational way, and it amounts to this. The plaintiff says, "I, in the belief that a certain valuation had been made, paid certain moneys to you; I have since found that the valuation was not made, I therefore say there is a duty on your part to repay me." Would the duty of repayment arise until this notice was

given? I apprehend not; for at what other time could it have arisen? Not at the moment when the money was paid; for it was paid with the intention that the defendant should keep it. Was it, then, at the moment when the mistake was discovered? This would be most unjust; the mistake was the plaintiff's, and the discovery is the plaintiff's, and the defendant may still think that everything is right, and that no mistake at all was committed. Therefore, until notice no duty would arise, and therefore no cause of action. The argument of Sir G. Honyman as to the duty of knowledge is against him; for, where in this case, is the duty to communicate knowledge? Clearly in the plaintiff. Let me suppose the case that the plaintiff had brought against the defendant an action of trover or detinue for the promissory note. It is admitted that the plaintiff could not have established his cause of action without some demand; for how could there be a wrongful detention until some claim was made? If this is so, how can money paid be demanded back by an action without previous notice? Suppose I hand over money to some one to take care of, without the obligation of retaining it in specie (and I do not include circumstances constituting the relation of banker and customer), I must give notice to him that I want it back before he is indebted to me, or is under any present duty in respect of it. It is contended that no demand is necessary where there is already a cause of action. But this is begging the question; for the contention on the other side is, that there can be no cause of action till demand; and the case of *Wilkinson* v. *Godefroy* (1) is an authority in favour of that position. Therefore, on this ground alone, without saying anything of other grounds, the plaintiff cannot succeed, he not having done that which was necessary to entitle him to maintain an action for money had and received.

PIGOTT, B. I am much struck with the observations which my learned Brothers have made as to the necessity of a demand to entitle the plaintiff to maintain the action, and I am disposed to acquiesce in their view; but I prefer to rest my judgment on the nature of the agreement between the parties. This valuation was in substance an award between an outgoing and an incoming

(1) 9 A. & E. 536.

1869

FREEMAN v. JEFFRIES.

tenant, and the subject matter of it is all the defendant's interest in the farm, that is, everything which the custom of the country would give to him as against his landlord. Now, if we look at the transaction with reference to these circumstances, no doubt it was not in the contemplation of the parties that the plaintiff should pay for what he did not get; but it was in the contemplation of the parties that the valuers should determine what was the custom of the country, and what was to be paid according to it, and it was contemplated that there might be differences of opinion, and even some errors in the valuers. But it was not contemplated that for some slight errors the whole transaction should be ripped up and rescinded; and that when everything was swept away, and the whole surface of the farm changed, a question which has thus become impossible of determination should be transferred from an examination under favourable circumstances, and by a convenient tribunal, to a trial before an inconvenient tribunal and under most unfavourable circumstances. This would be not justice, but a great wrong to the defendant. It is plain that the parties intended the whole matter to be left to the valuers, with the chance of such error as they might make, but with power to determine what should finally be due. There was, therefore, no mistake of fact in the plaintiff, who paid upon a valuation which was actually made, but the mistake if any was the mistake of the valuers.

Rule absolute.

Attorneys for plaintiff: *Sharpe, Parker, & Pritchard, for Josselyn & Son, Ipswich.*

Attorneys for defendant: *Smith & Co., for G. L. Gross, Ipswich.*

MAXTED *v.* PAINE. (Second Action.)

1869
May 8.

Sale of Shares—Usage of Stock Exchange—Ultimate Buyers—Principal and Agent.

The plaintiff having through his brokers on the Stock Exchange sold to the defendant, a jobber, ten shares in Overend, Gurney, & Co., Limited, the defendant on the name-day gave to the plaintiff's brokers the name of Goss as the ultimate buyer. No objection was made to the name, and the plaintiff executed a transfer to Goss of the ten shares. It was afterwards discovered that the brokers named on the ticket as the brokers of Goss had been instructed by S. to buy, and had in fact bought, a large number of shares for S. as undisclosed principal. The ten shares in question (the dealings not being for specific shares) were delivered to them as part of the shares so purchased; but the name of Goss was passed in pursuance of S.'s instructions, and according to an arrangement by which Goss, who was a person of no means, consented to allow his name to be passed in consideration of a sum of money paid to him. The purchasing brokers, as well as the defendant, were ignorant of this arrangement. Calls having been made on the shares, which the plaintiff was compelled to pay, and which he was unable to recover from Goss, he brought this action to recover them from the defendant:—

Held (by Kelly, C.B., and Bramwell and Pigott, BB., Cleasby, B., dissenting), that Goss was an ultimate purchaser within the meaning of that term as applied in the usage of the Stock Exchange; that the defendant had fulfilled his obligation by passing a name to which no objection was taken according to the usage, and that, in the absence of any fraud either in the defendant or in the purchasing brokers, the defendant could not be treated as ultimate buyer himself or be made liable for calls.

Special case. On the 24th of May, 1866, the plaintiff, by his brokers, sold on the Stock Exchange to the defendant, a jobber, 100 shares in Overend, Gurney, & Co., Limited. The company had already, on the 10th of May, stopped payment, and their transfer books had been closed on the 12th; and the shares, which were for 50*l.* each, with 15*l.* paid up, were sold to the defendant at 17 discount for the next account day, the 30th of May. On the 29th of May, the name-day, the defendant, in accordance with the usage of the Stock Exchange, as set out below, handed to the plaintiff's brokers name-tickets for the 100 shares, one of the tickets containing the name of Goss as the nominee and ultimate purchaser of ten shares at 2*s.* 6*d.* discount, Messrs. Foster & Braithwaite being named on the ticket as his brokers. The tickets were received by the defendant from Messrs. Barry on the Stock Exchange, to whom he had sold shares in the company for the same

1869

MAXTED v. PAINE.

account day, the dealings not being for specific shares. They were accepted by the plaintiff's brokers, who on the account day received from the brokers named on the tickets the sums due on account of their respective purchases, and credited the defendant with the amount, and they also credited him in account current with 200*l.*, being the sum of 2*l.* on each share, due to him under the original sale. The plaintiff was not aware of those transactions. A transfer of the ten shares was in due course executed by the plaintiff to Goss, and delivered by the plaintiff's brokers to Messrs. Foster & Braithwaite as the brokers of Goss. They, however, delivered the transfer to the solicitors of Sir Samuel Sprye, under the following circumstances:—

On the 2nd of May Sir S. Sprye had instructed Messrs. Foster & Braithwaite to purchase for him 140 shares in the company; the shares were purchased and were paid for by Sir S. Sprye, but on the 14th of May his solicitor directed the brokers not to pass his name as purchaser, and on the 29th of May the brokers accordingly passed the name of Goss as purchaser. Goss's name was given in pursuance of an arrangement made with him by the solicitors of Sir S. Sprye, by which he agreed for the sum of 4*l.* 10*s.* to take a transfer of the shares into his name; he was in poor circumstances and wholly irresponsible, but of this arrangement, and of Goss's circumstances, Messrs. Foster & Braithwaite were ignorant. The defendant was wholly ignorant of these matters.

No application was made by or on behalf of the plaintiff, either to the committee of the Stock Exchange or to the defendant, for a new name until the 13th of April, 1867; the plaintiff having been till a short time before that date unaware of the facts. A statement of the facts was then laid before the committee by the plaintiff's brokers, but they declined to interfere, on the ground that Foster & Braithwaite had acted in good faith in passing Goss's name as purchaser. Two calls of 10*l.* each had been made since the sale of the shares, which the plaintiff was compelled to pay, and which he could not recover from Goss, who was without means; he therefore now sued the defendant for the amount.

A copy of the printed rules and regulations of the Stock Exchange in force on the 24th of May, 1866, was made part of the case. (1)

(1) The principal rules applicable to the matter may be found appended to the case of *Grissell* v. *Bristowe* (Law Rep. 4 C. P. at pp. 54–56); rules 49, 61 and 98 are also set out below at pp. 206, 214.

The Court was to be at liberty to draw inferences of fact; and the question for the opinion of the Court was, whether under the above circumstances, the plaintiff was entitled to recover from the defendant the amount paid by the plaintiff in respect of the calls on the shares.

The usage of the Stock Exchange as proved before the arbitrator, was set out in the 13th paragraph of the case, which was as follows:—

Post 375. 6 B & S 313.

When a broker is instructed by his principal to sell shares on his account, he goes on to the Stock Exchange and deals with either a jobber or another broker, as the case may be. In case a broker deals with a jobber, he asks the jobber for the price of a particular class of shares, without saying whether he (the broker) desires to sell or buy. The jobber then names two prices to the broker, the one that at which he will buy, the other that at which he will sell. If the broker be willing to sell at the price named, he declares to sell, and accepts the offer of the jobber to buy at that price. Thereupon the bargain, which is as follows, is concluded between them. The bargain is made for a certain specified day, which is known on the Stock Exchange as the "account day;" and on the day preceding the account day (which latter day is known on the Stock Exchange as the "name-day") the jobber is bound to pass to the broker the name of a person or persons (as the case may be) as the ultimate purchaser, or respective purchasers, of the said shares, but the jobber may in lieu thereof give his own name to the broker as the ultimate purchaser of the shares, or, in the event of his having had no dealing with the shares subsequent to the original bargain, then as the purchaser of the shares, in which latter cases he is bound himself to take to the same. This name is passed upon a document called a ticket, which is in the following form, mutatis mutandis:—

	£	s.	d.
15*l.* paid, $1\frac{13}{16}$ discount . . .	131	17	6
Stamp . . .	0	15	0
	£132	12	6

10 shares, Overend, Gurney, & Co.

Francis Peppercorn, of West Street, Hertford.

30 May, 1868. Watson, Cowell, & Co., pay.

1863

MAXTED v. PAINE.

Ante 204

6 Ex 177

The dealings in the shares after the concluding of the first bargain may have been either many or few, but in all cases the ticket is endorsed, either in pencil or ink, with the names of the members of the Stock Exchange, whether acting as principals or brokers, through whose hands the ticket has passed. In addition to his obligation to give the name or names aforesaid, the jobber is also liable to the broker for the price of the shares as agreed upon, and the broker can either apply for the price to the jobbers, or can apply to the broker of the ultimate purchaser for the amount of the purchase-money which he is to pay for the shares, looking to the jobber for the difference (if any). But the usual practice is to make application in the first instance to the broker of the ultimate purchaser, and whose name appears on the ticket as the person to pay, as shewn on the above form of ticket. In the event of the jobber failing to give a name by two o'clock on the name-day, the broker has the right, after the lapse of an hour, to sell out the shares as against him by auction on the Stock Exchange through the medium of another broker, who is however in most instances the secretary or clerk of the Stock Exchange. The jobber then becomes liable to the broker for the difference (if any) between the price at which the shares are so sold and the price originally bargained for between the broker and jobber. At any time before the transfer of the shares has been executed by the seller (1) the broker may object to any name or names given by the jobber, and in the event of the jobber and broker failing to agree, the broker may appeal to the committee of the Stock Exchange, who, on such appeal, have the power to require the jobber to give to the broker a better name, in case they consider the broker to be thereunto entitled. The witnesses, however, differed somewhat as to the principles which would govern the committee in arriving at a decision upon the matters so referred to them. Several witnesses stated that in their opinion the committee would not interfere in the event of a name having been given bonâ fide, notwithstanding it could be shewn to the committee that the nominee was an irresponsible person, or in other words, that except in the case of fraud or mala fides, the committee would not go into any question

(1) By rule 98 registered shares or stock, if not delivered within ten days, may be bought in against the seller.

as to the pecuniary position of the nominee; whilst two witnesses, the one the secretary and the other the only member of the committee examined, stated that the committee would entertain the objection, if it were proved to the committee that the nominee was certainly an irresponsible person, or incapable of fulfilling the obligations attached to the shares. All the witnesses however agreed that, even after a transfer had been executed, the committee would entertain any question laid before them, where fraud or want of good faith in any such transaction could be shewn on the part of any member of the Stock Exchange engaged in such transaction. Subject as aforesaid, when a jobber has given a name and the price of the shares has been paid, the jobber has fulfilled all the obligations required of him by the usages of the Stock Exchange in respect of the original bargain.

The witnesses before the arbitrator stated that, if the broker wishes to secure the registration of the shares and the exoneration of his principal from all future liability in respect of the same, he makes a special bargain with the jobber in express terms to that effect (1), but in that case the price offered by the jobber is often very considerably below the price which he would otherwise have offered.

Only one instance of such a special bargain was proved by the witnesses to have taken place before the year 1866, viz., in 1853; and the witnesses all agreed that these special bargains had only been made (unless in very rare instances) since the panic of 1866. Several of the witnesses, who for many years past have done an extensive business on the Stock Exchange, had never made a special bargain even since that date.

It was further stated that jobbers frequently pass their own names for shares when they have not resold them.

It was also stated by one of the witnesses, but objected to by counsel for the plaintiff as inadmissible, that the broker's object in dealing with a jobber was that with a jobber he could always find a ready and immediate market.

April 21. *Pollock, Q.C.* (*Herschell* with him), for the plaintiff. The defendant became liable as purchaser, and could only rid him-

(1) See *Cruse* v. *Paine*, Law Rep. 4 Ch. 441.

1869

MAXTED v. PAINE.

self of liability by handing in at the proper time the name of some other genuine purchaser. The power of discharging himself in this way is an exceptional and peculiar one, and must be exercised strictly within the limits of the usage. But a purchaser, within the meaning of the usage and in common sense, is a person who has intended to be an actual bonâ fide purchaser on the market, not one who has been merely paid to allow his name to be given in, without any intention of ever becoming really a holder of the shares.

[BRAMWELL, B. Could not the name of a son or a trustee for the person who had bought the shares, be given in by the broker, supposing him solvent?]

In that case it would not be a merely colourable transaction.

[BRAMWELL, B. Could the plaintiff have sued Goss?]

It must be admitted that he could, unless indeed Goss were entitled to say that he was deceived into the bargain.

[KELLY, C.B. What answer could the plaintiff have made to Goss, if Goss had claimed the shares?]

It does not follow that the defendant is discharged. If he has procured the plaintiff to execute a transfer to Goss, and so to be no longer able to transfer the shares to the defendant, it is his own fault; his duty was to find a bonâ fide purchaser, or to remain liable to the plaintiff, and he has not satisfied the first branch of the alternative; he has only given in a name which purports to be the name of a purchaser, but which is in fact the name of a person who never instructed Foster & Braithwaite to purchase, for whom they never acted, and who never paid the price for which the shares were bought. This argument is consistent with the cases of *Grissell* v. *Bristowe* (1), and *Coles* v. *Bristowe* (2), and the conclusion follows from the language used in the former case by Cockburn, C.J., at pp. 45—47, and in the latter case by Lord Cairns, L.C., at pp. 10, 11.

Macnamara (*Beresford* with him), for the defendant. The question is what contract was in fact made between the parties, that is, between the plaintiff's brokers and the defendant. That contract was according to the custom of the Stock Exchange, and so regarded, the defendant's contract was to give bonâ fide to the vendor

(1) Law Rep. 4 C. P. 36. (2) Law Rep. 4 Ch. 3.

on the name-day the name of some person who would take a transfer of the shares. The case may be stripped altogether of any question as to whether the person whose name is given can be reasonably objected to. That is otherwise provided for. It would not be possible that the jobber, who knows nothing of the names which he gets, should between the name-day when the names are given in, and the next day when the accounts are settled, be able to ascertain anything as to their solvency, but at any time before the transfer is executed, objection may be made by the seller's brokers to the committee of the Stock Exchange; and the effect of Rule 98, which only allows the buyer to buy in against the seller after the expiration of ten days from the account day, is to extend the time for objection in all cases to ten days. The plaintiff's argument practically contends for a liability on the jobber to answer for the solvency of the ultimate purchaser, but this is opposed to *Grissell* v. *Bristowe* (1), and *Coles* v. *Bristowe* (2), and these cases have been followed by *Cruse* v. *Paine.* (3) But supposing this action otherwise maintainable it is impossible that the plaintiff can now maintain it, having actually executed a transfer of his shares to Goss. It is clear that by this act Goss has become the actual owner of them: *Torrington* v. *Lowe* (4), *Shephard* v. *Murphy.* (5) No fraud or want of bona fides is shewn in the defendant; and if there was fraud anywhere it was in Sprye or in his brokers, and the plaintiff should seek redress against them.

Pollock, Q.C., in reply. In *Torrington* v. *Lowe* (4) the buyer was a genuine buyer and solvent; in *Cruse* v. *Paine* (3) registration was guaranteed.

Cur. adv. vult.

May 8. The following judgments were delivered:—

CLEASBY, B. In this case the plaintiff directed certain stockbrokers, Sandeman & Co., to sell for him 100 shares in a company styled Overend, Gurney, & Co., Limited. They sold the shares to the defendant, a jobber on the Stock Exchange. The following is a

(1) Law Rep. 4 C. P. 36.
(2) Law Rep. 4 Ch. 3.
(3) Law Rep. 4 Ch. 441.
(4) Law Rep. 4 C. P. 26.
(5) Ir. L. Rep. 2 Eq. 544.

1869

MAXTED v. PAINE.

copy of the contract:—"2, Royal Exchange Buildings, May 24th, 1866. Sold by order and for account of E. P. Maxted, Esq., 100 Overend, Gurney, & Co. shares, at 17 discount. For the 30th inst. Sandeman, Dobree, and Co."

The contract was made on the Stock Exchange, and is clearly subject to the usages of the Stock Exchange relating to such contracts. And the action is brought on this contract, the plaintiff alleging that the defendant has not performed it on his part.

The question in the cause is, whether there has been a due performance of the contract, taking into consideration the usages referred to.

The result will not turn, as far as my opinion goes, on the reasonableness of the particular usage; but I do not wish to be understood as expressing an opinion that the plaintiff would be bound by any usage which a court of law would consider unreasonable. I think, on the contrary, that he would not, unless he had actual notice when he authorized the contract to be made of the particular usage. A man may, of course, if he thinks proper, make a contract with any stipulations in it which are not unlawful, as, for instance, that he will not enforce it without the authority of some particular officer or committee; but such a usage on the Stock Exchange would not, I think, bind a person having no connection with the Stock Exchange, and no actual knowledge of its usages, simply because he employed a stock-broker to contract for him, even though it was within the authority of the broker to make the contract on the Stock Exchange.

By the Stock Exchange Regulations, Rule 61, it is provided that no member shall attempt to enforce by law a claim arising out of Stock Exchange transactions against a member or defaulter, without the consent of such member, or of the trustees of the defaulter, or of the committee. This has no application to the outside principal of the member, and has never been considered to have any.

It is true that the jobber contracts with the broker according to the usages of the Stock Exchange; but if he knew (as he generally does know) that the broker was contracting for an outside principal, then he could not say as against that outside principal, "the contract is ~~an act~~ which, according to our usages,

cannot be enforced." It seems to me that in the proper view it is a question of principal and agent, and what is the agent's authority? If the principal forbids the broker to bargain for him according to the peculiar usages of the Stock Exchange, and limits his authority to specified contracts, the broker could not bind him to a contract to be performed according to those usages. But if he does not limit his authority, then there is an implied authority to deal according to the usages of the Stock Exchange. But this, like other implied authorities, would be limited to such usages as are not unreasonable. Being implied by the law, it is in that way limited by the law; the law does not imply a contract or authority with terms which it regards as unreasonable. The members of the Stock Exchange, if they enter into ordinary contracts with strangers, cannot by their usages make the law inapplicable to them; rather the law as superior must apply to them, and it recognizes the usages as modifying the ~~authority~~ contract, but only so far as they are reasonable.

This is the way in which I should regard the question if I thought it turned on usage; but it is unnecessary to consider the reasonableness of the usage any further, because I do not think the case turns upon it. The contract having been made, both parties are bound by it, not by the usage of the Stock Exchange, but by the power of the Common Law, and the usage of the Stock Exchange is properly introduced for the purpose of shewing the manner in which the contract may be performed.

Now here a difficulty arises in ascertaining what the usage is. It is unfortunate that such important rights should depend upon anything so uncertain. There is not a word on the subject in the printed regulations of the Stock Exchange, nor is there any document or writing to shew what that usage is. No doubt there are adjudged cases on the subject of this usage; but if they are to be admitted as evidence of it they are not conclusive, because this usage is not like the prescriptive custom, which is something fixed; it may vary from time to time. All the members of the Stock Exchange, or probably a committee, might settle, as they have done, what is to be the practice and usage relating to such matters. The usage therefore established must depend upon the views and opinions of competent persons called to prove it. I am,

1869

MAXTED v. PAINE.

of course, bound by the usage as stated in the case, but here there is much uncertainty; evidence is set forth, and the result is to be a matter of inference which I am authorized to draw.

I can only say that, in coming to a conclusion as to what the usage is (so far as it is left to inference), I must have regard to the origin and object of the particular usage, and I should be disposed to limit it to carrying into effect the purposes for which it was intended. So limited, the usage would necessarily be a convenient and reasonable one; but applied beyond those purposes it would (so far as it was so applied) assist only transactions which were not legitimate and regular.

Now the conclusion at which I have arrived respecting the usage in question, founded upon the statement and evidence in this case, and the nature of the transactions to which it applies, is this. The jobber may be called a share merchant, and generally has a selling and a buying price, and buys and sells to a great extent; and convenience has introduced two days a month on which the transactions of the intervening period are to be completed.

As the jobber does not buy for investment, but for the purpose of selling, convenience has introduced a usage that, instead of the shares being transferred to the jobber, they shall be transferred to the several persons to whom he has sold. He may have bought 100 shares and sold them in parcels of 10. This is the simplest form of the usage, which substitutes in the transfer the sub-vendee for the vendee. But the transactions are in reality much more complicated, and at each transfer the jobber has to deliver and receive a considerable number of shares, and, as between two jobbers, the balance only is made the subject of transfer. But in that case there is seldom if ever a real transfer from one to the other, and the jobber, who has bought and does not wish to have a transfer made to him, must find some real purchaser who has bought, and (not being a dealer in shares) wishes to have them transferred into his name.

This has introduced the machinery of a ticket, which contains the name of such a person, and is made out by his broker and signed by him, and passes among the jobbers from hand to hand, until it gets to the hand of a jobber who has to take an actual

transfer from his vendor, and that name is by the usage substituted for his. The several jobbers settle with each other the difference of price upon their respective transactions.

Now I am to draw all such inferences of fact as a jury might properly draw, and thinking that the usage for the jobber to substitute a name for his own is really limited to the legitimate purposes for which it was intended, I find as a fact that it does not apply when the name given is not that of an "ultimate purchaser," (to use the words of paragraph 13 of the case on the subject of usage), but is that of a man of straw, selected because he is a man of straw, and bribed to permit his name to be used.

In the present case the man Goss whose name was passed was, according to the statement in the case, a man of that description. The real ultimate purchaser was Sir Thomas Sprye, and Goss, whose name was given, was a pauper chosen on that account, and received a sum of 4*l.* 10*s.* for allowing it.

I also find as a fact that the ticket by which the name is passed must, by the usage, be a bonâ fide document; but in this case it was a falsehood and a continued falsehood. It falsely represented Goss, the pauper-substitute, to be a purchaser of the shares at 2*s.* 6*d.* discount, that is to say at 14*l.* 17*s.* 6*d.* per share, and so imposed upon every person into whose hands it came, and at last upon the brokers of the plaintiff, who made out the transfer upon the basis of it.

The ticket, according to the usage, passes current among the jobbers. This currency makes it a most important document, and must be upon the faith of its being genuine.

I should therefore decline to infer that the same usage which made it pass current, recognized as coming within the usage a document which is fabricated for the purpose of imposition. It would be something like a usage to make counterfeit coin a legal tender.

This conclusion of fact shews that the defendant has not satisfied the usage, not having given the name of an ultimate purchaser in compliance with it, and therefore continues responsible to the plaintiff. This makes it unnecessary to consider the effect of the right to object to a particular name, and to have the objection referred to a committee of the Stock Exchange, the parties being bound by their decision as stated in paragraph 13. But, in con-

1869

MAXTED v. PAINE.

sidering such cases as the present, it must be borne in mind that this committee is a domestic forum, which has no jurisdiction whatever over any persons who are not members of the Stock Exchange; and the outside vendor or purchaser has no right to appeal to this forum, and therefore could not be bound by its decisions. It is true that, if he employed a broker who was subject to its rules, he might in that way indirectly come within its influence, but that would depend entirely upon the contract which he made with his own broker.

The rules and regulations [Rules 49, 61] (1) of the Stock Exchange shew clearly, that the outside vendor or purchaser is regarded as the contracting party, having all the legal rights of a contracting party, and that the rules are not intended to affect those rights.

Nothing which I have said is in any way at variance with the judgments in the cases of *Grissell* v. *Bristowe* (2) and *Coles* v. *Bristowe*. (3) And the case of *Cruse* v. *Paine* decided first by V.-C. Giffard (4), afterwards by Lord Hatherley, L.C. (5), shews that in transactions of this nature, the only contract of sale is with the jobber (not with his nominee), and that the execution of the transfer to the jobber's nominee does not preclude the vendor from saying the jobber has not performed his contract.

My judgment is founded upon the conclusion of fact at which I have arrived for the reasons given, and as the defendant has not performed his contract according to the usage, there ought in my opinion to be judgment for the plaintiff.

Post 216

6 Ex 148

(1) *General Rules applicable to Stock Exchange Transactions*:—

"49. The Stock Exchange does not recognize in its dealings any other parties than its own members: every bargain, therefore, whether for account of the member effecting it, or for account of a principal, must be fulfilled according to the regulations and usages of the House; and should a principal, without the consent of the committee, attempt to enforce by law a claim against a member of the Stock Exchange, the committee will decide as to the liability of the broker or agent of such principal for any cost or damages incurred in consequence of legal proceedings.

"S. 61. No member shall attempt to enforce by law a claim arising out of Stock Exchange transactions against a member or defaulter, or against the principal of a member or defaulter, without the consent of such member, or the trustees of the defaulter, or of the Committee."

(2) Law Rep. 4 C. P. 36.

(3) Law Rep. 4 Ch. 3.

(4) Law Rep. 6 Eq. 641.

(5) Law Rep. 4 Ch. 441.

1869

MAXTED v. PAINE.

PIGOTT, B. I have come, but not without hesitation, to the same conclusion as the Lord Chief Baron and my Brother Bramwell. I had great doubt if I could say that Goss, who is a mere man of straw, answers to the description of an "ultimate buyer," which must mean at least a bonâ fide transferee.

But I know not how to define the expression "ultimate buyer" within the meaning of the language of the Stock Exchange. It certainly does not mean one who buys in the ordinary sense for value. It is evident indeed that the transferor may give value to the transferee, as a consideration for taking the shares from him. Then, how can the expression bonâ fide transferee be defined? It is equally difficult. It cannot mean that no one may be a transferee who, if the shares should prove worthless, will be unable to pay all future calls upon them, for that would preclude a purchaser from giving shares to a poor friend or relative.

The expression must, I think, be taken with reference to the circumstances of each case, which may vary to any extent, and the only escape from the difficulty which I can discover is that expressed in my Brother Bramwell's judgment, viz., an appeal to the Stock Exchange Committee (1), who, upon objection made at the proper time, will decide between the parties, having regard to their own understanding of their own rules and the circumstances of each case of objection. Any other conclusion would work injustice to the defendant, and the view we take may operate very hardly on the plaintiff. I am not satisfied with the decision of this case, nor with the rules of the Stock Exchange, which may work great hardship upon innocent parties. But I can find no more satisfactory solution.

BRAMWELL, B. I am of opinion that the defendant is entitled to judgment. The case was given up by the plaintiff (2) except as to the shares, in respect of which the name of Goss was given. The facts are as follows. On the 24th of May, 1866, the plaintiff, by his brokers, Messrs. Sandeman, Dobree, & Co., members of the Stock Exchange, sold on the Stock Exchange to the defendant, a jobber

(1) Post, p. 218.

(2) In this action the plaintiff also made a claim against the defendant, in respect of other shares, part of the 100 shares sold by the defendant for the plaintiff.

1869

MAXTED v. PAINE.

and member of the Stock Exchange, 100 shares in the Overend, Gurney, & Co. This sale must be taken to be according to the rules and practice of the Stock Exchange. There can be, I think, no question here as to the reasonableness of those rules and practice. The brokers were members of the Stock Exchange; the bargain took place on its market to the defendant, a member. It must have been, then, according to its rules and practice.

This is so plain to my mind, that nothing is necessary to prove it. If the defendant had said to the broker, "Of course this transfer is according to our Rules and practice," there could have been but one answer. It cannot matter that a remark, idle and unnecessary, was not made: see rule 49. (1) If the plaintiff in proper person had been the actual seller, he might contend that he was bound only by reasonable customs, and that what is relied on by the defendant is not reasonable. But he was not the seller. His broker was. If he gave no authority to his broker to sell on those terms there is no contract with the defendant.

If he did—if he says, as he does, there is a contract—then it is that which his brokers made for him, viz., one according to the rules and practice of the Stock Exchange. I have said the brokers *sold;* in truth, they were to give money, and did give money, to have the shares taken; perhaps the more correct expression would be to say they agreed to transfer, and the defendant agreed to be or find a transferee. I may observe that one fallacy advanced in these cases is that the bargain made is not fulfilled, but something else done instead. This is not so; the jobber gives a name other than his own, by virtue of and in pursuance of the original contract. On the name-day the defendant, according to the rules and practice of the Stock Exchange, gave the name of one Goss to the plaintiff's brokers, as the person to whom ten of these shares were to be transferred.

The name of this person was given to the defendant by Messrs. Foster & Co., members of the Stock Exchange, to whom the defendant had sold or agreed to transfer ten shares. This bargain also was subject to the rules and practice of the Stock Exchange. Goss's name was given with his authority. He was not objected to by the plaintiff or his brokers, but a transfer was executed to

(1) Ante p. 214, note (1).

him by the plaintiff and handed to Messrs. Foster & Co. for Goss. Upon this state of facts, then, it appears that the defendant had found a transferee of ten shares for the plaintiff, to whom the plaintiff had executed a transfer and who was bound to indemnify the plaintiff.

It turned out that Goss was not a buyer of shares, nor a responsible person. Sir S. Sprye was Foster & Co.'s principal, and the real buyer from the defendant, but Goss agreed for a sum of money to save Sir S. Sprye from the risk of giving his, Sir S. Sprye's, name, and to allow his, Goss's, name, to be given, and to take the shares. This was not known to the defendant. If Goss had been a solvent person he would have been made to indemnify the plaintiff, but, as I have said, he was not. Then calls were made on the shares, and Goss being unable to pay them or indemnify the plaintiff, the plaintiff has paid them and brought this action. For what? There are no pleadings, and no precise statement of his case. But it must be that the defendant has not done some part or all of what he contracted to do. The question then is, did he contract to do other or more than he has done? This is a pure question of fact, what was the contract according to the rules and practice of the Stock Exchange.

I am of opinion on the evidence that it required nothing different from or more than the defendant did.

Paragraph 13 contains the evidence. In it there is found: "At any time before the transfer of the shares has been executed by the seller, the broker may object to any name or names given by the jobber, and in the event of the jobber and broker failing to agree, the broker may appeal to the committee of the Stock Exchange, who, on such appeal, have the power to require the jobber to give to the broker a better name, in case they consider the broker to be thereunto entitled;" and, "subject as aforesaid, when a jobber has given a name, and the price of the shares has been paid, the jobber has fulfilled all the obligations required of him by the usages of the Stock Exchange in respect of the original bargain."

I think the plaintiff would have had a right, according to these rules and practice, to object to Goss's name. I think Goss was a person he could not have been compelled to accept as a transferee. If I am wrong in this, the plaintiff has clearly no case. If I am

1869

MAXTED v. PAINE.

right, then, had he objected, the defendant must have found a fresh name. He, the defendant, might then have objected to Foster & Co., and they must have given a fresh name. But the plaintiff did not nor did his brokers object, but he executed the transfer to Goss.

Having done so, I think they cannot show that the defendant was bound to do anything more than, or different from, what he has done. I have said the question here is not what is reasonable, the question is what is the practice. Still, the more reasonable an alleged practice is shewn to be, the more likely it is to be the true practice. As to the general reasonableness of the rules and practice in question, nothing can be better said than what was said by the Lord Chief Baron in *Grissell* v. *Bristowe* (1); but as to the particular part of the custom in question here, it can be shewn to be not merely reasonable but almost necessary to be as the defendant contends.

By the rules the seller has ten days to make the transfer. During these ten days he can make inquiries as to the proposed transferee. The jobber or other middleman has not a moment; for, on the day he receives the name, he must pass it on. It might in time get back to the broker who first gave it. Further, the question is whether the intended transferee is satisfied, not whether the middlemen are. The defendant might have been satisfied as to Goss's name, not so the plaintiff. In all reason, then, the transferee shall make the inquiries.

It is to be observed that the names and addresses were correctly given. Goss was not called esquire, or gentleman, or merchant. If there had been any fraud, no doubt there would be a remedy. The reasonableness will be more apparent when, in addition, it is remembered that the Stock Exchange Committee sit as a court of equity and honour to make right be done; that if, for instance, Foster & Co. were wrong to pass Goss's name (which I am far from suggesting), the committee would compel them to make amends, either at the instance of the plaintiff or his broker. The unreasonableness of a different custom would appear from this very case. The defendant heard nothing of this claim till April, 1867, at earliest, if not later; the transfer then executed, Foster & Co. and Sir S. Sprye, both able to say to any claim made by the defendant

(1) Law Rep. 4 C. P. at p. 52.

that it was late, and possibly the means of the different parties altered. Again, the plaintiff has a remedy against Goss; suppose Goss could pay 100*l.*, is the plaintiff to have it and this action too? What remedy has the defendant, if he is liable? He cannot tender him a transfer and the certificates of the shares, nor as far as I see make any valid claim on him.

Further, have Sir S. Sprye, Goss, and Foster & Co. done wrong? If so, an action would lie against them by the plaintiff, the person injured by that wrong; if not, why should any action lie against the defendant, who would thereby be made liable for the acts of others, which were not wrong in those others?

I am of opinion that the defendant is entitled to judgment. If I am wrong, it is on a question of fact, viz., what is the bargain made in such cases, what is the usage. This is no question of law, but of fact.

KELLY, C.B. This claim to recover the call made in respect of a number of shares in Overend, Gurney, & Co., sold by the plaintiff to the defendant, has been abandoned (1) except as to ten shares, and the circumstances of the case as to these appear to lie within a very narrow compass.

The plaintiff, through his broker, sold these ten shares to the defendant, a jobber, for the account day; and the day before the account day, which is called the name-day, the defendant gave in the name of one Goss as the ultimate purchaser. The plaintiff made no objection to Goss, and in due time executed a transfer, and delivered it to him, or his broker, through his own broker; and Goss, who had given authority to have his name delivered in as the ultimate purchaser, accepted the transfer executed by the plaintiff, who had in the meantime received through his own broker the price of the shares.

It appeared that before Goss became entitled to these shares they had been purchased by Sir Samuel Sprye, who, upon the failure of Overend, Gurney, & Co., agreed with Goss that he should become the purchaser or transferee of the shares, not indeed for any price to be paid by him, but upon receiving the sum of 4*l.* 10*s.* as the condition upon which he was to accept the

(1) See ante, p. 215, note (2).

1869

MAXTED v. PAINE.

shares; and further, it is admitted that Goss was an insolvent, or at least an irresponsible man.

The defence is that, by the usage of the Stock Exchange, upon the basis of which both the sale and purchase of these shares is admitted to have taken place, the jobber,—who is the original purchaser of shares, upon giving in the name of another as the ultimate purchaser, if the name be accepted without objection, and has been given in with the authority of the nominee, and the transfer to the nominee has been executed by the seller and accepted by the nominee, and the price has been paid to the seller,—has performed his part of the contract, and is discharged. For this the case of *Grissell* v. *Bristowe* (1) is an authority directly in point; and I am of opinion that on this ground the defendant is entitled to the judgment of the Court.

It was argued for the plaintiff, first, that the jobber is not discharged by the mere giving in of a name, unless it is the name of one to whom no reasonable objection can be made; in other words, that the jobber warrants that the nominee shall be open to no reasonable objection; and some passages in the judgment of Cockburn, C.J., in *Grissell* v. *Bristowe,* are relied upon to support the proposition. But the language of the Lord Chief Justice upon this point is misunderstood. It is true that the nominee must be a person open to no reasonable objection, but this means only that by the usage of the Stock Exchange the seller has the right to object to him, and has ten days from the account day for that purpose. If an objection be made, it is referred to the committee of the Stock Exchange, and admitted or overruled according to the truth and justice of the case; and if admitted, the jobber is bound to find another nominee free from objection, or to perform the contract himself. But if, as here, the nominee be accepted without objection, and, as before observed, the seller transfers to him and he accepts the transfer, the jobber has performed his contract, which was not absolutely to accept the shares as purchaser, but only to accept them and become the purchaser himself, or to name another who is unobjected to, or turns out to be free from objection, and who, having authorized the use of his name, becomes the ultimate purchaser; and the jobber is then discharged.

(1) Law Rep. 4 C. P. 36.

1869

MAXTED v. PAINE.

It was further objected on behalf of the plaintiff that the transfer of the purchase from Sir Samuel Sprye to Goss was fraudulent and void, and that Goss was therefore not a real and bonâ fide nominee, either by law or according to the usage of the Stock Exchange. But this is not so. Any holder of shares in a joint stock company may lawfully sell and transfer them, and cease to be the proprietor of them, and vest the property in them in the vendee with or without consideration, or even, as in this case, paying a sum of money to the vendee to accept them, although the vendee be irresponsible or insolvent; and if the name of an insolvent who has thus become the owner of the shares be given in by the jobber as the ultimate purchaser, the seller according to the usage may object to him, if he think fit; and, as already remarked, has ten days from the account day for that purpose. But if he fail to do so, and accepts the nominee without inquiry, he has only himself to blame, and he is bound by the usage to recognize him, and him alone, as the purchaser. Besides, if there were any fraud in this part of the transaction, which there was not, it was not known either to the defendant, or the brokers, or the purchaser's jobber, or indeed to any of the other parties interested in or connected with this contract, except Sir Samuel Sprye and Goss himself, and therefore could not affect the rights and liabilities of the one or of the other. Under these circumstances, the plaintiff having accepted Goss as the ultimate purchaser, and having actually executed to him a transfer of the shares, he has no longer the power to transfer them to the defendant, the original purchaser, who, having performed his part of the contract, has exonerated himself from all liability to the plaintiff, and is entitled to the judgment of the Court.

Judgment for the defendant.

Attorneys for plaintiff: *Freshfields.*
Attorneys for defendant: *J. & M. Pontifex.*

1869
May 14.

[IN THE EXCHEQUER CHAMBER.]

EARL OF DERBY *v.* THE BURY IMPROVEMENT COMMISSIONERS.

Nuisance—Sewers—Construction—Local Act and General Act—Compensation—Nuisances Removal Act, 1855 (18 & 19 *Vict.* c. 121), s. 22—*General Highway Act* (5 & 6 *Wm.* 4, c. 50), s. 67.

The defendants were commissioners under a local act, which empowered them to make drains through private enclosed lands, after giving twenty-eight days' public notice, with power to persons interested to object and to appeal. The defendants were also, as such commissioners, by s. 3 of the Nuisances Removal Act, 1855, the local authority; and as the local authority, were, by s. 22 of the same act, and by s. 67 of the General Highway Act, empowered, without giving notice, to make drains through private enclosed lands adjoining a highway, for the purpose of removing an existing nuisance. A watercourse used as a sewer being a nuisance, and a new sewer being necessary to remove the nuisance, the defendants, without giving notice, made a new sewer through the plaintiff's enclosed land adjoining a highway, not in the line of the watercourse:—

Held, reversing the decision of the Court below, that the defendants were entitled to act under either the local act or the general act, at their election; and that the making of the sewer in that manner was within their powers under the general act.

S. 22 of the Nuisances Removal Act, 1855, construed with s. 67 of the General Highway Act, empowers the local authority, where a new sewer is necessary, to make the same in any direction they think fit through private enclosed lands adjoining a highway, although no sewer previously existed there.

The same sections provide compensation for damage caused by the making of such a sewer, to the owner or occupier of the land through which the same is made.

Error on a special case, on which the Court of Exchequer gave judgment for the plaintiff. (1)

The case was stated in an action brought by the plaintiff, as reversioner, against the defendants, for constructing a sewer in his land under the following circumstances. The plaintiff's land was bounded by a high road, and was traversed by a stream called Huntley Brook, which received the drainage of several sewers. The brook having become a nuisance, the defendants constructed the sewer in question, carrying it for a short distance by the side of Huntley Brook, and thence diagonally across the plaintiff's land, being enclosed land, and where there was no public way, to the adjoining high road, and there connecting it with an existing

(1) Law Rep. 3 Ex. 121, where the facts and material sections of the acts in question are fully set out.

system of sewers below. The nuisance could not have been removed without constructing a new sewer, and the course pursued by the defendants was the most inexpensive and convenient for the purpose.

The defendants were commissioners under the Bury Improvement Act, 1846 (9 & 10 Vict. c. ccxciii.), and as such were, by s. 3 of the Nuisances Removal Act (18 & 19 Vict. c. 121), the local authority under that act; and were also, by s. 82 of the local act, surveyors of highways.

By s. 22 of the Nuisances Removal Act, whenever any drain or watercourse "is a nuisance within the meaning of this act, and cannot, in the opinion of the local authority, be rendered innocuous without the laying down of a sewer, or of some other structure *along the same, or part thereof, or instead thereof*, such local authority shall, and they are hereby required, to lay down such sewer or other structure, and to keep the same in good and serviceable repair; and they are hereby declared to have the same power as to entering lands for the purposes thereof . . . as are contained in 5 & 6 Wm. 4, c. 50, s. 67 . . . and the provisions contained in this section shall be deemed to be part of the law relating to highways in England, &c."

By 5 & 6 Wm. 4, c. 50, s. 67, power is given to surveyors "to make, &c., drains, &c., in and through any lands or grounds adjoining or lying near to any highway, upon paying the owner or occupier of such lands or grounds, provided they are not waste or common, for the damages which he shall sustain thereby."

The defendants, however, had also power, under their local act, ss. 101, 102, 110, 111, to make drains through all places within the limits of their act (within which the place in question was); and, if necessary, "through any enclosed lands or place not being a public way . . . making full compensation to the owners and occupiers thereof;" but they were bound, before doing so, to give twenty-eight days' notice, and persons thinking themselves aggrieved were entitled to object and to appeal to the quarter sessions. The defendants had not given any notice under the act.

The Court below (Martin, B., dissenting) held that the defendants were not entitled under s. 22 of the Nuisances Removal Act, 1855, to make the drain in the manner they had done, for that that section

1869

EARL DERBY v. BURY IMPROVEMENT COMMISSIONERS.

only empowered them to make a sewer in the same line with the old sewer, except perhaps in the case of absolute necessity; that s. 67 of the Highway Act, providing compensation, did not apply to permanent injury to, or occupation of, the land, and that the defendants ought to have proceeded under their local act.

The defendants brought error.

Manisty, Q.C. (*Holker* with him), for the defendants.

Jones, Q.C. (*J. A. Russell* with him), for the plaintiff.

The arguments urged, and the cases cited, were the same as in the Court below; and *Jones, Q.C.*, also cited the following authorities to shew that a special act is not repealed by a subsequent general act, not wholly inconsistent with it: *Fitzgerald* v. *Champneys* (1); *Goldson* v. *Buck* (2): *Birkenhead Docks* v. *Laird* (3); *Conservators of the Thames* v. *Hall* (4); *Dr. Foster's Case* (5); *O'Flaherty* v. *M'Dowell* (6); 1 Black. Com. p. 89; Dwarris on Statutes, p. 531—2; 1 Kent's Com. p. 466, n. (7)

Cur. adv. vult.

May 14. Hannen, J., read the judgment of the Court (Willes, Keating, Hannen, Brett, and Hayes, JJ.) prepared by

WILLES, J. The question for consideration is, whether the Bury Improvement Commissioners were justified in making a new sewer through Lord Derby's land, in order to convey away sewage of the town, previously insufficiently provided for by an open watercourse, which had become a nuisance irremediable, except by the construction of a new sewer, and the sewer actually made being the most inexpensive and convenient that could be constructed?

That question branches into four. First, whether any power to make new sewers is conferred by the Nuisances Removal Act, s. 22? And if yea, secondly, whether the commissioners have any discretion as to the position of the new sewer, or are bound to make it as near as may be to the course of the old nuisance? Thirdly, whether they are shewn to have abused their powers?

(1) 2 J. & H. 31; 30 L. J. (Ch.) 777.

(2) 15 East, 372.

(3) 4 De G. M. & G. 732; 23 L. J. (Ch.) 457.

(4) Law Rep. 3 C. P. 415.

(5) 11 Rep. 63 a, b.

(6) 6 H. L. C. 142, 157.

(7) See also Sedgwick on Statutory Law, p. 123.

And, lastly, whether, if the preceding questions be answered in favour of the commissioners, they are disabled from acting under the General Nuisances Removal Act, by reason of having previously had power to take the same course under the Bury Local Act, after notice, which notice has not been given?

Upon the first question, no member of the Court below suggested any doubt, and we entertain none, that the words "instead thereof," in the 22nd section, do import a power to make a new sewer, wherever that is the proper course in order to cure the nuisance.

The second question is answered by reference to the powers of a surveyor of highways under the 67th section of the General Highway Act, which powers are conferred in terms upon those who act under the 22nd section of the Nuisances Removal Act. The 67th section gives authority to the surveyor to "make, &c., all ditches, gutters, drains, or watercourses, and also to make and lay such trunks, tunnels, &c., *as he shall deem necessary* in and through any lands or grounds adjoining or lying near to any highway, upon paying the owner or occupier of such lands or grounds for the damages which he shall sustain thereby." Construing this section with section 22 of the Nuisances Removal Act, we are of opinion that the necessity for making a new sewer being ascertained as a matter of fact, it was for the commissioners to exercise their judgment in what direction that new sewer should be made through the adjoining land, and that, so long as they exercised an honest discretion, without misconduct or negligence, they are not liable to have their judgment overruled in a court of law.

The third question is answered by the Lord Chief Baron, in delivering the judgment of the majority of the Court below, as follows: "If the traversing of the plaintiff's enclosed field were necessary to the completely remedying or removing the nuisance in question, I should think that even that measure might be resorted to under the 22nd section. But," the Lord Chief Baron adds, "it is quite obvious that this end may be accomplished by merely carrying away the accumulation of filth, and converting the open drain into a covered sewer, upon the same spot, and in the same direction as that which now exists. It is therefore that I think that the local authority have exceeded their powers in entering and cutting through the enclosed land of the plaintiff." The case, however,

1869

EARL DERBY v. BURY IMPROVEMENT COMMISSIONERS.

as I read it, does not state that the alternative course thus contemplated was feasible or advisable; indeed, so far as I can divine, the result of substituting a closed tortuous tube for an open tortuous passage shews the contrary; nor, in the absence of peculiar local and technical information, can I arrive at the conclusion by inference that the course of making the new sewer deemed by the commissioners to be necessary, and constructed by them in the most inexpensive and convenient course, was an unnecessary act, in abuse of the powers vested in them by the statute. There is no suggestion of excess or abuse in the statement of facts upon which our judgment ought to be founded. In the absence of any proof to the contrary, credit ought to be given to public officers, who have acted primâ facie within the limits of their authority, for having done so with honesty and discretion.

Upon the fourth point many cases were cited to shew that special privileges conferred by statute upon individuals, or special constitutions imposed upon limited bodies, are not to be considered as repealed by subsequent general legislation not expressly or by necessary inference inconsistent with the former. Those authorities are only so many illustrations of the rule generalia specialibus non derogant. They are inapplicable to the present case, where the local act conferred upon the commissioners a power conditional upon giving notice, and the general act gives power to all such bodies to do the same thing without such notice. The notice contemplated by the local act is not a right of the persons to receive notice, but a mere restriction of the power under the local act, making that power inapplicable where no notice is given. There is no more inconsistency in the two powers co-existing, and either of them being exercised at the option of the commissioners, than in the general covenant to repair co-existing in the same lease with a covenant to repair after a month's notice, either of which may be enforced by the landlord. (1) Upon this point the Lord Chief Baron expresses his concurrence with Martin, B., and Channell, B., does not appear to have expressed any opinion to the contrary.

I therefore agree in the opinion of Martin, B., in the Court below. Nor can any real injustice follow, because the compensation clause in the act is abundantly large to secure to Lord Derby com-

(1) See *Few* v. *Perkins*, Law Rep. 2 Ex. 92.

pensation in money for all damage or deterioration of his property by the act of the commissioners: *Lister* v. *Lobley*. (1)

The judgment ought to be reversed, and judgment ought to be given for the defendants.

Judgment reversed.

Attorneys for plaintiff: *Appleby, Wright, & Crowther, for S. & S. Woodcock, Bury.*

Attorneys for defendant: *Ridsdale & Craddock, for Harper & Dodds, Bury.*

[IN THE EXCHEQUER CHAMBER.]

May 14.

FERRAR *v.* THE COMMISSIONERS OF SEWERS IN THE CITY OF LONDON.

Compensation—Public Works—Lands Clauses Act, 1845 (8 *Vict. c.* 18), *s.* 68 —*City of London Sewers Act*, 1848 (11 *& 12 Vict. c. clxiii*).

The City of London Sewers Act, 1848, by s. 2 incorporates the Lands Clauses Act, 1845; but s. 3 excludes the operation of those provisions of the Lands Clauses Act which relate to "the purchase and taking of lands otherwise than by agreement;" and those words are the descriptive heading of ss. 16—68 of that act. Compensation was given by the special act in certain special cases of injury to, and interference with, property; but no compensation was given for the injurious affecting of lands generally. The plaintiff, whose premises were injuriously affected by works executed by the defendants under the powers of the local act, claimed compensation under s. 68 of the Lands Clauses Act:—

Held, reversing the judgment of the Court below, that s. 68 of the Lands Clauses Act was not incorporated in the local act.

Quære, whether, if s. 68 of the Lands Clauses Act had been incorporated, compensation could have been claimed under it, the plaintiff not being entitled to compensation by any other statutory provision.

ERROR on a special case on which the Court of Exchequer gave judgment for the plaintiff. (2)

The plaintiff claimed compensation for injuries alleged to be caused to his premises by the act of the defendants, in raising the level of Liverpool street, in the city of London, under the powers contained in the City of London Sewers Act, 1848 (11 & 12 Vict.

(1) 7 A. & E. 124.

(2) Ante, p. 1, where the facts of the case and the material sections are set out.

1869

FERRAR v. COMMISSIONERS OF SEWERS OF LONDON.

c. clxiii.), s. 120; and brought an action in which a special case was stated; the questions for the Court being,—Whether the plaintiff was entitled to compensation; and if so, whether by action or under the Lands Clauses Act, 1845, or any other act.

The City of London Sewers Act, 1848 (s. 2), incorporates the Lands Clauses Act, 1845, but (s. 3) excludes the provisions of that act "relating to the purchase and taking of lands otherwise than by agreement."

By s. 5 of the Lands Clauses Act, 1845 (8 Vict. c. 18), it is provided that subsequent acts may incorporate portions of that act relating to any particular matter, describing the matter to be incorporated "as it is described in this act in the words introductory to the enactment with respect to such matter;" ss. 16 to 68 inclusive are introduced by the words, "and with respect to the purchase and taking of lands otherwise than by agreement;" and s. 68 provides that "if any party shall be entitled to any compensation in respect of any lands or of any interest therein, which shall have been taken for, or *injuriously affected by*, the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provision of this or the special act, or any act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of 50*l.*, such party may have the same settled either by arbitration, or by the verdict of a jury, as he shall think fit," &c.

J. Brown, Q.C. (*J. O. Griffits* with him), for the defendants. The judgment of the Court below cannot be sustained; for, first, even if s. 68 of the Lands Clauses Act, 1845, were incorporated, it would not confer on the plaintiff a right to compensation. It only provides methods of redress for the case of those who are already entitled, but does not itself create or extend that right. But secondly, that section is excluded by the plain words of s. 3 of the local act; and what their sense is is shewn by the very structure of the Lands Clauses Act, and confirmed by the provisions of s. 5. Moreover, the local act shews by inference that this was the intention; for s. 159 (1) providing for compensation in certain cases, expressly refers to this section (s. 68), which would be un-

(1) Ante, p. 5, note.

necessary if it were already incorporated. And again, the provisions of the local act shew that whenever compensation was intended to be given it was expressly provided for, as in ss. 53, 71, 153, 156, 159 (1); while, on the other hand, in ss. 104, 125 (2), it empowers the commissioners to do acts which may be in derogation of private rights, in cases where compensation is obviously excluded. The same intention is shewn by ss. 236, 239 (3), which are intended to provide for all cases where compensation is to be claimed on account of works executed under the act. But if compensation is not given by statute, it is plain that no right to it exists at all; for the works have been executed by statutory authority: *Boulter* v. *Crowther*. (4)

Keane, Q.C. (*Barnard* with him), for the plaintiff. If s. 68 is incorporated, compensation is given, for the right to it is clearly implied. It is incorporated, for the words of exception in s. 3 of the local act must be taken according to their plain sense, and not as interpreted by another act. For this contention *Broadbent* v. *Imperial Gaslight Company* (5) is an authority; for there Willes and Crompton, JJ., delivered their opinion, which Lord Cranworth, L.C., adopted, that s. 68 was under similar circumstances incorporated.

[HANNEN, J. There the Gasworks Clauses Act, 1847 (10 Vict. c. 15) was also incorporated, which by s. 6, supposing it applicable, gave compensation; it was only necessary, therefore, to go to s. 68 for the method of redress; and it was not contended that, without the former section, s. 68 of the Lands Clauses Act would give compensation. The decision was, however, that those sections

(1) For ss. 53, 153, 156, 159, see ante, pp. 4, 5 (note). S. 71 empowers the commissioners to open and inspect drains, &c.; in case the drains, &c., are found in good order, they are to cause them to be closed and made good, "and full compensation shall be made by them for all damage or injuries done or occasioned by the opening of any such drains, &c."

(2) S. 104 empowers the commissioners to erect urinals, &c., for the accommodation of the public; by s. 125 no vault is to be made under a street without the commissioners' consent; the section also regulates the mode of making them, and gives the commissioners power to fill up vaults made contrary to the act at the expense of the person making them.

(3) Ante, p. 5, note.

(4) 2 B. & C. 703.

(5) 7 D. M. & G. 436, 456, 463; 26 L. J. (Ch.) 276; see however *Reg.* v. *Mayor of London*, Law Rep. 2 Q. B. 292.

1869

FERRAR v. COMMISSIONERS OF SEWERS OF LONDON.

were not applicable, inasmuch as they only applied to acts authorized by the special act, and that the act in question was not so authorized.]

It is at least an authority to shew that the use of such words of exclusion as this does not necessarily exclude the whole portion of the general act which is introduced by them. *Leader* v. *Moxton* (1) shews the rights of persons injured by acts of this kind, and cannot be considered as overruled by *British Cast Plate Manufacturers* v. *Meredith*. (2) All such claims were intended to be provided for and systematized by these acts.

Brown, Q.C., in reply. In *Broadbent* v. *Imperial Gaslight Company* (3) the words of exception were "except so much of the last-mentioned act (8 Vict. c. 18) as relates *exclusively* to the purchase and taking of land by compulsion." That compensation must be specially provided for, when it is claimed in the case of public works executed under statutory authority, is shewn by the provisions made in acts which confer such powers, as, for instance, the Markets and Fairs Clauses Act (10 Vict. c. 14), ss. 6, 11.

COCKBURN, C.J. We are all of opinion that the judgment of the Court below must be reversed. The claim is for compensation in respect of injuries affecting the plaintiff's premises, in consequence of the acts of the defendants in altering the level of a street. When we look at the local statute under which the defendants have acted, it is clear that they have acted within the limits of their authority; but the act contains no machinery providing for compensation to persons whose premises may be affected. It is said, however, that s. 2 incorporates the Lands Clauses Act, 1845, and that, though primâ facie, s. 68 of that statute appears to relate only to the procedure by which compensation is to be assessed to those who are already entitled to it, yet its principal importance, in fact, consists in this, that it does confer a right to compensation, and that it must do so for this reason, that there is no other provision relating to compensation for land injuriously affected by acts done under the powers either of that or of the local act. It is not necessary to decide whether, supposing s. 68 to be

(1) 3 Wils. 461. (2) 4 T. R. 794.
(3) 7 D. M. & G. 436; 26 L. J. (Ch.) 276.

incorporated, this argument is well founded or not, though we have considerable doubts on that point, and should, if we had been driven to decide it, have taken time to consider. But we are all of opinion that that section is not incorporate. For though s. 2 incorporates in general the Lands Clauses Act, 1845, yet s. 3 makes an exception of all that part of the act which relates to the taking of lands otherwise than by agreement. Now, when we turn to that act for our guidance as to what that portion is, we see that there, as in some other similar acts, in order to avoid the necessity of inserting seriatim the clauses to be incorporated or to be excluded in an act which it is intended shall incorporate part only of the provisions, it is provided that this partial incorporation may be made by incorporating or excluding in the mass the sections falling under a particular heading or title. Now, here we have a series of clauses under the heading "with respect to the purchase and taking of lands otherwise than by agreement," and this heading occurs between ss. 15 and 16, and introduces all the sections from s. 16 up to s. 68, no other heading occurring till after that section, and then a new heading introducing s. 69. It is, therefore, quite impossible to say that s. 68 is not to be considered as included under that heading; it is necessary to make up the part introduced by the title prefixed to s. 16, and which runs on to s. 69. Being therefore included in that part, it is excluded by s. 3 of the local act.

But it has been further pointed out that by s. 159 of the local act compensation is given in a particular set of cases, and it is expressly said that the compensation shall be assessed under the Lands Clauses Act, 1845. Now, if s. 68 was not excluded by s. 3 of the local act, it would clearly not be necessary to introduce this provision for that particular case.

We were urged, however, with the case of *Broadbent* v. *Imperial Gaslight Company* (1), as an authority for the plaintiff. But that case is plainly distinguishable, for there the local act incorporated the Lands Clauses Act, 1845, with the exception of so much only as related *exclusively* to the purchase and taking of lands by compulsion. It therefore left untouched that which related to responsibility for injuriously affecting lands. The 68th section, therefore, was not excluded, but remained untouched. Looking, however,

(1) 7 D. M. & G. 436; 26 L. J. (Ch.) 276.

1869

FERRAR v. COMMISSIONERS OF SEWERS OF LONDON.

at the 3rd section of this local act, and comparing its other provisions, it is plainly impossible to consider that it was the intention of the legislature to incorporate s. 68 with it. Even, therefore, if we were prepared to hold that by inference and implication s. 68 would, if incorporated, give the right to compensation claimed by the plaintiff, yet holding that its operation is excluded, we must give our judgment for the defendants, reversing the judgment of the Court below.

KEATING, LUSH, HANNEN, BRETT, and HAYES, JJ., concurred.

Judgment reversed.

Attorneys for plaintiff: *Brown & Godwin.*
Attorney for defendants: *A. G. Baylis.*

May 14.

[IN THE EXCHEQUER CHAMBER.]

SPILL *v.* MAULE.

Libel—Privileged Communication—Actual Malice—Evidence for the Jury.

Libellous expressions used in a privileged communication may be evidence of actual malice for the jury; but if, taken in connection with admitted facts, they are such as might have been used honestly and bonâ fide by the defendant, the judge may withdraw the case from the jury and direct a verdict for the defendant.

The defendant, in a privileged communication, described the conduct of the plaintiff as "most disgraceful and dishonest." The conduct so described was of an equivocal nature, and might honestly and bonâ fide be supposed by the defendant to be such as he described it:—

Held that, implied malice being negatived by the privilege, there was no evidence of actual malice, and that a verdict for the defendant was properly directed by the judge at the trial.

BILL OF EXCEPTIONS to the ruling of Martin, B., in an action for libel tried at Westminster on the 13th of June, 1868.

The libel declared on was contained in a letter written by the defendant, a creditor of the plaintiff's firm, and engaged under an agreement with the firm in winding up their affairs, to Messrs. Collier & Co., who were also creditors of the firm. The letter was in the following terms:—

"I think it right to inform you that Mr. Briggs has consulted

Mr. Spill's assignees and myself as to certain letters which you have addressed to him. The proceedings which Mr. Briggs has been advised to take are quite in accordance with our views, and although I have no right and no wish to dictate to you any particular line of conduct, I cannot help saying that your proceedings entirely contradict the spirit of your letters, in which you profess to act only for the benefit of the general body of creditors. I may state that the conduct of Mr. Spill (the plaintiff), has been *most disgraceful and dishonest*, and the result has been to diminish materially the available assets of the estate. I think you ought to have satisfied yourselves that the statements made by Mr. Spill's solicitor are really in accordance with the facts, before taking a course which will be in opposition to the wishes of the creditors, and also will still further diminish the amount available for distribution and will greatly delay the payment of another dividend."

The transaction to which the defendant referred was as follows. Disputes having taken place between the plaintiff and his partner, Mr. Briggs, both before and in relation to the winding-up, and the plaintiff suspecting Mr. Briggs to be "drawing out money on his private account," and "helping himself," he on the 13th of December, 1866, took from the cash-box of the firm a parcel of bills to the amount of 1264*l.*, directing the clerk to take an account of them, and to tell Mr. Briggs to debit plaintiff's account with them. These facts were proved by the plaintiff in his examination in chief, and this being the plaintiff's case the learned judge directed a verdict to be entered for the defendant. A bill of exceptions was tendered to this ruling, on the ground that though the communication was privileged, yet the terms used in the letter were evidence of actual malice, and ought to be left to the jury.

Huddleston, Q.C. (*J. O. Griffits* with him), for the plaintiff. It may be admitted that the communication was privileged; but *Toogood* v. *Spyring* (1) shews that with respect to privileged communications it is a question for the jury, whether under the circumstances and from the style and character of the language used, the libel was in fact malicious; for the circumstances which create privilege only protect communications which are "fairly warranted by any reason-

(1) 1 C. M. & R. 181.

1869

SPILL v. MAULE.

able occasion or exigency, and honestly made." (1) *Wright* v. *Woodgate* (2) shews that the letter is to be left to the jury, as containing itself evidence on which they may find actual malice in its author. The libellous letter was also left to the jury in *Cooke* v. *Wildes* (3), and that course was sanctioned by the judgment of the Court, who declined to say that there were "no expressions in it which do not exceed the limits of privilege, and which may not be considered evidence of malice." The same principle was applied to an action of slander in *Jackson* v. *Hopperton*. (4) In the present case the letter applies the terms "disgraceful and dishonest" to the plaintiff's conduct; it should have been left to the jury to compare those terms with the circumstances to which they related, and to express their opinion as to whether the disproportion between the two did not furnish evidence of actual malice. He also referred to *Gilpin* v. *Fowler*. (5)

[LUSH, J. Your contention amounts in substance to saying, that in every case the words of defamation must be left to the jury as evidence of actual malice.

COCKBURN, C.J. If implied malice is rebutted by the existence of privilege, actual malice may be set up by the circumstances of the case compared with the language used; and this is a question of degree, to be judged of in each case by seeing whether, under the circumstances proved, the language could have been used honestly and bonâ fide.]

Butt, *Q.C.* (*Ballantine*, *Serjt.*, and *Giffard*, *Q.C.*, with him), for the defendant. It may be admitted that expressions may be used so far beyond what the occasion calls for as to raise a presumption of actual malice for the jury; but the question must still arise, and be determined by the judge, whether the libel furnishes any evidence at all on which the jury could find malice. There may certainly be cases where uncontroverted evidence shews clearly that the use of the language was warranted by the circumstances, although it turns out that the statements made, or the description of the plaintiff's conduct given, are not in fact true. In such a case, if the jury found actual malice their verdict would be set aside, and if so, it is for the judge

(1) 1 C. M. & R. at p. 193.
(2) 2 C. M. & R. 573.
(3) 5 E. & B. 328, 340; 24 L. J. (Q.B.) 367.
(4) 16 C. B. (N.S.) 829.
(5) 9 Ex. 615.

to exercise his discretion as to whether there is any evidence for them. And the limit to his discretion is similar to that which exists in cases of negligence, where it is not a mere scintilla of evidence that will entitle him to leave the matter to the jury, but there must be evidence on which they may reasonably find for the plaintiff. So, here, if the evidence will not support a finding of malice, the question of malice ought not to be put to the jury at all. Now, in this case, the plaintiff admitted that he had acted in a manner which might honestly be described in the language of the defendant's letter, although it was also capable of another construction. If so, the defendant's conduct was as capable of receiving the construction of honesty and bona fides as of malice, and the evidence admitting of either hypothesis, a conclusion adverse to the defendant cannot be drawn from it. *Cowles* v. *Potts* (1), and *Manby* v. *Witt* (2), shew that a communication made under the circumstances existing here is privileged (3), and *Fryer* v. *Kinnersley* (4), and *Caulfield* v. *Whitworth* (5), shew the necessity of express malice being clearly proved where privilege exists, the nature of the circumstances which will prove it, and the duty of the judge to withdraw the question from the jury when the evidence is insufficient: where the proof rests on a comparison of the expressions used with the events described, there must be something beyond a natural, though it may be in fact an inaccurate, description of equivocal conduct.

Huddleston, Q.C., in reply.

COCKBURN, C.J. On the whole we are of opinion that the learned judge was right in directing a verdict for the defendant in this case. We are all agreed that the general proposition contended for by the counsel for the plaintiff is right, and that it may be that the language used in a libel, though under other circumstances justifiable, may be so much too violent for the occasion and circumstances to which it is applied, as to form strong evidence

(1) 34 L. J. (Q.B.) 247.

(2) 18 C. B. 544; 25 L. J. (C.P.) 294. 2 Jur. N.S. 1004

(3) This point was in fact conceded by the plaintiff. The defendant was acting in winding up the affairs of the firm, in pursuance of an agreement of the 18th of June, 1866, by which he was empowered by the firm to do so.

(4) 15 C. B. (N.S.) 422; 33 L. J. (C.P.) 96.

(5) 18 L. T. (N.S.) 527.

1869

SPILL v. MAULE.

of malice, upon the issue of whether the communication is covered by the privilege, and that an inference of actual malice may be drawn from its use. If, therefore, any question of fact arose with respect to the circumstances, it should be left to the jury. But we must look to see what really took place on this occasion. The defendant was a creditor of a firm of which the plaintiff was a partner, and was therefore interested in the winding up of the affairs of the partnership which was then going on. In the course of this winding up, the matters occurred in reference to which the defendant wrote the letter complained of. Certain disputes having arisen between the plaintiff and his late partner, Briggs, relating to the partnership transactions, Collier & Co., the firm to whom the defendant's letter is addressed, had written a letter to Briggs as to the state of affairs, which had been brought to the knowledge of the defendant; and the defendant, who, as a creditor of the plaintiff and Briggs, was an interested party, writes to Collier & Co. with reference to this letter and the matter to which it related; it was, therefore, clearly a privileged communication.

The question then arises, whether the language is too strong for the occasion; the terms applied to the plaintiff's conduct being "most disgraceful and dishonest." Now, the communication being privileged, the presumption is in favour of the absence of malice in the defendant, and in order to rebut this presumption, the plaintiff must shew actual malice, and he may no doubt shew this by a reference to the terms of the libel as being utterly beyond and disproportionate to the facts. We must look, then, to see whether the circumstances are such as to rebut on the part of the plaintiff the presumption of the absence of malice in the defendant. Now, in his own evidence, the plaintiff disclosed a fact to which, it may be fairly presumed, the defendant referred in his letter, namely, the fact that the plaintiff had taken away bills forming part of the assets of the firm in a manner indicating an intention to retain them. This act was capable of a twofold construction; it might have taken place under such circumstances that the plaintiff could not properly be exposed to any moral censure, as, for instance, if he only intended to keep the assets in security for the benefit of creditors: or the circumstances might have been such that in taking the bills he acted dishonestly and disgracefully.

1869

SPILL
v.
MAULE.

Now, the presumption of law being in favour of the absence of malice in the defendant, and the only evidence of malice being his description of acts done by the plaintiff, which were capable of a two-fold construction, that presumption of innocence which attaches to the writer must also, where his act is capable of a double aspect, still attend him. Starting with the presumption of innocence in his favour, we must assume that the defendant did entertain that view of the plaintiff's acts which induced him to believe, and honestly to believe, and say, that the plaintiff's conduct was dishonest and disgraceful. We have not to deal with the question whether the plaintiff did or did not act dishonestly and disgracefully; all we have to examine is whether the defendant stated no more than what he believed, and what he might reasonably believe; if he stated no more than this, he is not liable, and, unless proof to the contrary is produced, we must take it that he did state no more. It is usually the safer course to take the opinion of the jury on the question of actual malice; but the presumption being here in favour of the defendant, and facts being stated by the plaintiff which were compatible with an honest belief on the part of the defendant that the plaintiff had acted in the manner described, we think that the learned judge was right in his decision, and that there was no case to go to the jury to rebut the presumption in the defendant's favour.

KEATING, LUSH, HANNEN, HAYES, and BRETT, JJ., concurred.

Judgment affirmed.

Attorney for plaintiff: *A. D. Lamb.*
Attorneys for defendant: *Venning, Robins, & Venning.*

[IN THE EXCHEQUER CHAMBER.]

1869
May 14.

THE GENERAL STEAM NAVIGATION COMPANY *v.* THE BRITISH AND COLONIAL STEAM NAVIGATION COMPANY, LIMITED.

Ship and Shipping—Negligence—Collision—Compulsory Pilotage—Master and Servant—Port of London—Merchant Shipping Act, 1854 (17 & 18 *Vict.* c. 104)—*General Pilot Act* (6 *Geo.* 4, c. 125).

All vessels coming up the Channel to London, are required by s. 378 of the Merchant Shipping Act, 1854, to take a pilot on board at Dungeness, and to put him in charge of the ship.

From Dungeness to London Bridge is, by s. 370, constituted the Trinity House Pilotage district; but no pilot can be licensed to conduct ships both above and below Gravesend; and the pilotage rates are rates from Dungeness to Gravesend, and not to any intermediate place.

By s. 59 of 6 Geo. 4, c. 125 (the exemptions of which are retained by s. 353 of the Merchant Shipping Act, 1854), vessels being within their own port are exempted from compulsory pilotage.

By s. 388 of the Merchant Shipping Act, 1854, "No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law."

The defendants' vessel coming up the Channel to London, took a pilot on board at Dungeness; before reaching Gravesend, whilst the vessel was still under the control of the pilot, she came into collision with the plaintiffs' vessel, through the pilot's negligence. The defendants' vessel belonged to the port of London; and if the port extends to Yantlett Creek, she was at the time of the collision within her own port; if it only extends to Gravesend, she was not within her own port:—

Held, first, that for pilotage purposes the port of London extends only to Gravesend.

Secondly, that the exemption contained in s. 388 of the Merchant Shipping Act, 1854, does not require that the pilot should be compulsorily employed at the spot where the accident happens, but only that he should have been compulsorily employed within the district where it happens; and that the defendants were therefore within its protection.

Thirdly, that the defendants having been compelled (by s. 378) to put the pilot in charge of the ship, and being also compelled (by s. 333 and Sched. Table U.) to pay him the full rate for navigating the ship from Dungeness to Gravesend, the relation of master and servant was never constituted between them.

Semble, that the pilot had the right to insist on being carried to Gravesend, and on piloting the ship during its whole course thither.

ERROR on the judgment of the Court of Exchequer, given in favour of the defendants, on a special case stated by an arbitrator.

The plaintiffs sued the defendants for injury caused by a collision.

The defendants set up that their vessel was under the management of a pilot, in pursuance of the provisions of the Merchant Shipping Act, 1854, and that the accident was due to his negligence, for which they were not responsible. The plaintiffs replied, that the defendants' vessel was within her own port, the port of London, at the time of the collision, and the master, therefore (by 17 & 18 Vict. c. 104, s. 353, and 6 Geo. 4, c. 125, s. 59), not bound to have a pilot on board, and therefore not within the exemption of s. 388 of 17 & 18 Vict. c. 104. The defendants rejoined, that the vessel was not within the port of London at the time of the collision, or that, if she was, the port was not a place provided for by statute or charter, and therefore not within the exemption from compulsory pilotage of 6 Geo. 4, c. 125, s. 59; but that if she was within the exemption, yet the pilot was taken on board at Dungeness, where the master coming up the Channel was compelled to take him, and that, by the effect of ss. 333 & 378 of 17 & 18 Vict. c. 104 and the Sched. Table U., the employment of the pilot, and the pilotage rates, were from Dungeness to Gravesend, above the point where the collision took place, and that therefore the defendants were within the exemption from liability of s. 388.

The place where the collision occurred was between Yantlett Creek and Gravesend. The plaintiffs alleged that the port of London extended to the former place; the defendants that, for pilotage purposes, it extended only to the latter.

The Court below decided in favour of the defendants; the majority holding that the pilot having been taken on board, and being still on board in pursuance of the statute, and in discharge of his duty under it, the defendants were not responsible for his negligence; and the Court being equally divided on the question, whether the port extended, for pilotage purposes, to Gravesend or to Yantlett Creek. (1)

Feb. 6, 8. *Pollock, Q.C.* (*M. Chambers, Q.C.*, with him), for the plaintiffs, stated his case generally, and reserved a detailed argument till the reply.

Watkin Williams (*Sir G. Honyman, Q.C.*, with him), for the

(1) Law Rep. 3 Ex. 330, where the facts and the material sections are fully set out.

1869

GENERAL STEAM NAVIGATION COMPANY v. BRITISH AND COLONIAL STEAM NAVIGATION COMPANY.

defendants. First, even assuming the accident to have happened within the port, and that the pilot was not compulsorily on board, yet the defendants are not liable for his acts, for the relation of master and servant was never constituted between them and him. That relation exists only where the master has a power of choosing his own servants, as is ordinarily the case with a crew; and this power of choice is the reason given for the liability of a master for the acts of his crew in Molloy de Jure Maritimo, Book II., ch. 3, s. 13; the same ground of the obligation is stated in Pothier, Traité des Obligations, Part I. ch. 1, 2nd section, § 2 (No. 121). The doctrine is forcibly illustrated by *Milligan* v. *Wedge* (1), which is in principle undistinguishable from the present case taken in its least favourable view; for there the defendant was not bound to take a drover at all. The nisi prius dictum in *Bowcher* v. *Noidstrom* (2) to the contrary effect, is not of weight; the real decision in the case is adverse to it, for the master of the vessel was held not liable for the act of the crew, done in obedience to the pilot's orders, but without his knowledge. Moreover, the pilot was then compulsorily on board, and the case, if it were a decision in favour of the master's liability, would contravene what is admitted by the plaintiffs themselves to be the true rule of law. The principle deduced from *Milligan* v. *Wedge* (1), is conformable with the rule laid down in *Laugher* v. *Pointer* (3), and *Quarman* v. *Burnett.* (4)

Applying that doctrine to the present case, the pilot cannot be considered as the servant of the owner, for the master can at best only choose him out of a selected class. As a rule, however, he cannot even do this, but must take the pilot whose turn it is to serve (17 & 18 Vict. c. 104, s. 378); an unqualified pilot, when lawfully taken on board, may be superseded by a qualified pilot, who shares with him the dues (s. 360); and a pilot taken on board is liable to a penalty, if he quits the ship of which he has the charge, before the service for which he was hired (that is here, to navigate the ship to Gravesend), is performed (s. 365).

[BYLES, J. On your construction of the law, s. 388 of the Merchant Shipping Act would be superfluous.]

(1) 12 A. & E. 737.
(2) 1 Taunt. 568.
(3) 5 B. & C. 547, at p. 554.
(4) 6 M. & W. 499, at p. 509.

1869

GENERAL STEAM NAVIGATION COMPANY v. BRITISH AND COLONIAL STEAM NAVIGATION COMPANY.

On the opposite construction it would be so equally; for the plaintiffs contend that it only applies where the pilot is taken compulsorily, but admit that where he is so taken, the master is, at common law, not liable for his acts.

[MONTAGUE SMITH, J. It may be argued in your favour that the legislature must have known that there was no liability during the time when the master was compelled to commit his ship to the pilot, and must, therefore, by these words, have meant to give the extended immunity you claim. But supposing the master took his ship out of the hands of the pilot, where the pilot was no longer compulsorily in charge, would he not be liable?]

He would if he revoked the pilot's authority. The case of *Tyne Improvement Commissioners* v. *General Steam Navigation Company* (1), is not an authority in this case, for the only question before the Court was whether Tyne harbour came within the qualification of the exception in 6 Geo. 4, c. 125, s. 59, as a port provided for by statute or charter. The principle of *Conservators of the Thames* v. *Hall* (2) is in favour of the defendants.

Secondly, assuming still that the accident happened within the port, and that without s. 388 of the Merchant Shipping Act the defendants would be liable, that section protects them. The protection extends throughout the entire district, for which the pilot was compulsorily taken. The defendants had not come into a new district, for the port is not a pilotage district; and this is clear from the fact that there is no power of appointing pilots proper to the port. The Trinity House appoints pilots all the way to London Bridge, and no one else can do so; and there is no reason why the exemption from liability should cease only because, by virtue of another exception, the vessel is at the time of the accident in a place where the master is released from the necessity of taking a pilot on board. The act does not say that he is exempted from liability, provided the vessel is bound to take a pilot at the spot where the accident happened, but provided she was bound to take a pilot for the district.

[BYLES, J. You say that in the words "within any district where," in s. 388, the word "where" means "within which district;" the plaintiffs say that it means "at a spot where."]

(1) Law Rep. 2 Q. B. 65. (2) Law Rep. 3 C. P. 415.

1869

GENERAL STEAM NAVIGATION COMPANY v. BRITISH AND COLONIAL STEAM NAVIGATION COMPANY.

The reason of the thing is in favour of the defendants, for they were bound to take a pilot, and were bound to pay him wages to Gravesend (s. 333 (5), and Sched. U.).

[BYLES, J. The pilotage was compulsory throughout the whole district, in this sense, that the defendants were bound to take the pilot under a pecuniary penalty, and were also bound to pay him for the whole distance, and were therefore bound to use his services under a pecuniary penalty.]

Lucey v. *Ingram* (1) was relied upon by the Court below, and is an authority in favour of the defendants.

Thirdly: Taking it to have been well decided that s. 59 of 6 Geo. 4, c. 125, is revived by s. 353 of the Merchant Shipping Act, 1854, but reserving the right to question that decision in the Court of appeal, yet it is inapplicable; for, first, the vessel was not at the time the accident happened within the limits of the port; and secondly, if it was, the port is a port provided for by statute or charter within the meaning of that section. [Upon this point the argument was the same as in the Court below (2); the case of *The Killarney* (3) was also cited.]

Pollock, Q.C., in reply. First, there is no foundation for the argument that, apart from the statute, a master is not liable for the acts of a pilot voluntarily taken. Primâ facie, the owner of the wrong-doing ship is liable, and it is for him to shew that the liability is shifted from him to some one else. The cases relied on for the defendants turned on the employment of an independent contractor, which is so far distinguished from the case of a pilot that the liability of an owner for a pilot's acts is referred to and admitted in *Milligan* v. *Wedge*. (4) The owner, as dominus navis, is bound to conduct his vessel so as not to do injury to others; he cannot excuse himself on the ground that he has by a voluntary stipulation subjected himself to the will of another: *The Ticonderoga*. (5) He is liable for all acts, whether of the pilot or of the crew, except such as are done by a pilot imposed upon him by statute, *The Diana* (6), as was the case in *Bowcher* v. *Noidstrom*. (7)

(1) 6 M. & W. 302.
(2) See Law Rep. 3 Ex. 337–8.
(3) 1 Lush. 427; 30 L. J. (P. M. & A.) 41.
(4) 12 A. & E. at p. 741.
(5) Swab. 215.
(6) 1 Wm. Rob. 131.
(7) 1 Taunt. 568.

That this is so is shewn by the distinction which has always been made in the cases between compulsory and voluntary pilotage, which is an old and well-established one: *Carruthers* v. *Sydebotham* (1), *Neptune the Second* (2), *Attorney-General* v. *Case* (3), and lastly, *The Maria* (4), where the immunity in the case of compulsory pilotage is placed on general principles. The recent case of *The Halley* (5) in the Privy Council shews the distinction to be still recognized. The same doctrine is laid down in Story on Agency, s. 456 a. *Lucey* v. *Ingram* (6) is no authority to the contrary, for it was decided on wholly different provisions of another statute; but if it contravenes the doctrines contended for, it must be taken to be overruled by the later cases.

Secondly, the protection is extended no farther by s. 388, which was enacted only ex majori cautelâ, to meet a doubt which had been raised. The duty of the master to give over the control of his ship is correlative with the right of the pilot to assume it. Yet even when he is compulsorily employed, the pilot is bound to conduct the ship wherever within the limits of his licence the master directs him (s. 365 (10)); the master may direct him to any point, which shews that nothing is wanting to prevent the relation of master and servant existing, except that the master is compelled by statute to employ him. The true construction of the act is that, having reached the point where that compulsion ceases and the master becomes exempt from the necessity of having his vessel piloted, and where he may take the charge from the pilot, and the pilot cannot insist on retaining it, at that point, if the master continues to employ the pilot, it is a purely voluntary matter, and in no way within the provision of the act. *Tyne Improvement Commissioners* v. *General Steam Navigation Company* (7) is an authority in favour of both branches of the argument. He also referred to 17 & 18 Vict. c. 104, ss. 340—344, and s. 379.

Thirdly, it is certain that the accident happened within the limits of the port, and that the port is not a port with respect to which provision has been made by statute or charter. [The argu-

(1) 4 M. & S. 77, at p. 85.
(2) 1 Dodson, 467.
(3) 3 Price, 302.
(4) 1 Wm. Rob. 95, at p. 99.
(5) Law Rep. 2 P. C. C. 193.
(6) 6 M. & W. 302.
(7) Law Rep. 2 Q. B. 65.

1869

GENERAL STEAM NAVIGATION COMPANY v. BRITISH AND COLONIAL STEAM NAVIGATION COMPANY.

ments on this point were the same as those used in the Court below. (1) He also referred to the note in Maude & Pollock on Shipping, p. 206 (3rd ed.), and to 3 Geo. 1, c. 13, and to *Dodds* v. *Embleton.* (2)]

Cur. adv. vult.

May 14. The judgment of the Court (Byles, Keating, Mellor, Montague Smith, and Hannen, JJ.) was delivered by

BYLES, J. In this case, which was argued before us in the sittings after Hilary Term, the Court took time to consider. The short facts of the case were these:—

The defendants' vessel belonged to the port of London, and was on her homeward voyage from Quebec to London. She had taken on board a pilot from Dungeness to Gravesend. While below Gravesend, and proceeding up the river under the charge of that pilot, between Yantlett Creek and Gravesend, she came into collision with the plaintiffs' vessel, then coming down the river. It is to be assumed for the purpose of deciding the questions raised in the special case, that the damage was solely occasioned by the fault of the pilot of the defendants' vessel.

The two enactments on which the decision depends appear to be the Merchant Shipping Act, 1854, and 6 Geo. 4, c. 125. The 388th section of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), exempts the shipowner from damage occasioned by the fault or incapacity of any pilot, within the district where the employment of such pilot is compulsory. And s. 59 of 6 Geo. 4, c. 125, enacts that the master of any vessel may pilot his own ship while she is within the limits of the port to which she belongs.

It was contended on behalf of the plaintiffs, that the pilot was not at the time and place of the collision compulsorily employed, and therefore that the defendants were responsible for his negligence.

Two questions arise. First. Whether the accident happened at a spot within the limits of the port of London, for if it did not, then the defendants' captain was bound at that spot to have on board a pilot, and the defendants are not responsible for the pilot's want of skill or care. Secondly. Whether, assuming the spot where the

(1) See Law Rep. 3 Ex. 335-6. (2) 9 D. & R. 27.

accident happened to be within the port of London, the defendants nevertheless are protected from liability, although their vessel belonged to that port, the pilot having been compulsorily taken on board at Dungeness to pilot the vessel from thence to Gravesend.

As to the first question, viz., whether the accident happened at a spot within the limits of the port of London, it has been admitted, and indeed contended by the counsel on each side, and found by the arbitrator who stated the case, that the limits of the port of London may vary for different purposes; and we agree with them. For customs' purposes the port may extend to a line drawn from the Naze to the North Foreland, and for conservancy purposes it may extend from Staines Bridge to Yantlett Creek, but for other purposes it may extend to Gravesend only.

The precise question therefore is, what is the limit of the port of London for pilotage purposes. The passage from Lord Hale, "De Portibus Maris" (1), shews that the limits of a port may depend on the existence of wharves, quays, houses, buildings, and other conveniences. It may accordingly, from time to time, vary and increase with the increase of population and of buildings. Lord Hale further says, "The port of London anciently extended to Greenwich in the time of Edward I., and Gravesend is a member of it." The extent of a port, therefore, after the lapse of years may become a question of fact. That question of fact was submitted to the arbitrator, and he has found for the purposes of this action Gravesend to be the present limit of the port of London. We cannot, we think, disregard that finding, unless it appears to us contrary to law.

So far from thinking it wrong, either in fact or in law, we consider that there is good reason for thinking it right, having regard to pilotage purposes only, with which purposes alone we have here to do. By the bye-laws of the Trinity House, Gravesend has been always treated as the point to which the port of London extends for pilotage purposes. The Trinity House in their rules (see rule 15), made under their charter and act of parliament, describe the boundary of the port of London to be at a certain pillar at Gravesend; and in practice, pilots going down or up the river are changed at Gravesend. (2) Indeed, the river between the Nore and Gravesend,

(1) Chap. 2, at p. 46. (2) See Law Rep. 3 Ex. p. 338.

1869

GENERAL STEAM NAVIGATION COMPANY v. BRITISH AND COLONIAL STEAM NAVIGATION COMPANY.

as has been observed by my Brother Martin, is but an estuary, with no indications of the existence of a port. These reasons seem to us to shew that the arbitrator has rightly found Gravesend to be, for pilotage purposes, the limit of the port of London.

Therefore, as the accident occurred before the defendants' vessel arrived within the limits of the port of London, she was not, at the spot where the accident occurred, navigating within her own port, and therefore was not at that spot exempt from compulsory pilotage. It follows that the defendants are entitled to succeed in this action.

But, secondly, supposing the limit of the port of London to be for pilotage purposes Yantlett Creek, and the defendants' vessel therefore, having reached a point above that creek, to have been within the limits of the port of London, still we think the defendants are not liable.

By the table of pilotage charges, which is part of the act, 17 & 18 Vict. c. 104, pilots engaged from Dungeness or the Downs to London may be taken to go first to the Nore and Sheerness, and next to Gravesend, which is clearly within the port of London; and no pilot can be hired for any other intermediate distances.

If the master of the defendants' ship wanted to go to Gravesend, or beyond, he could not take a pilot for a shorter distance. It was compulsory on him to take a pilot for that distance at least. The pilot could insist on being paid all the way to Gravesend, and could insist on being carried to Gravesend. There had been in effect a contract between the captain and the pilot that the pilot should go to Gravesend, should be paid to Gravesend, and should act as pilot to Gravesend. Suppose a storm, a fog, or other emergency to have arisen endangering the life, not only of the crew, but of the pilot himself, surely the pilot could have insisted, not only on being carried to Gravesend, but on piloting the vessel thither according to his contract. It is plain that during the first portion of the transit between the Downs and Gravesend, the relation of master and servant did not exist between the owner of the defendants' vessel and the pilot; and we cannot see any indication of a fresh contract as to the latter portion of that transit.

Moreover, the 388th section of the 17 & 18 Vict. c. 104, does not require that the pilot should be compulsorily employed where the

accident happened, but only that he should have been compulsorily employed *within the district* where it happened. This is not only the literal interpretation of the statute, but it obviates all the mischief which might be apprehended from captains of ships unnecessarily and improperly employing pilots to escape the responsibilities of navigation, while it preserves the sole responsibility of the pilot in the whole of the district for which he was employed.

Our judgment does not conflict with the decision of the Judicial Committee of the Privy Council in the case of *The Stettin* (1); for in that case the pilot appears originally to have been taken on board where and when by law there was no necessity to take him. It would be superfluous for us to express any opinion on the case of *Lucey* v. *Ingram* (2), or its applicability to the case now under consideration: see, however, *The Annapolis* (3); *The Temora* (4); *The Killarney* (5); *The Earl of Auckland.* (6) For these reasons, we are of opinion that the judgment of the Court below must be affirmed.

Judgment affirmed.

Attorneys for plaintiffs: *Pearse & Co.*

Attorneys for defendants: *Bischoff, Bompas, & Bischoff.*

(1) Brow. & Lush. 199, 202; 31 L. J. (P. M. & A.) 208.

(2) 6 M. & W. 302.

(3) 1 Lush. 295; 30 L. J. (P. M. & A.) 201.

(4) 1 Lush. 17.

(5) 1 Lush. 427; 30 L. J. (P. M. & A.) 41.

(6) 1 Lush. 164; 30 L. J. (P. M. & A.) 121.

1869
May 15.

[IN THE EXCHEQUER CHAMBER.]

POPPLEWELL *v.* HODKINSON.

Right to Support—Support from Subterranean Water—Conveyance of Land for Building Purposes—Derogation from Grant—Covenant to Build to secure Rent.

21 L.J.D562
563

An owner of land has no right at common law to the support of subterranean water.

Semble :—One, who by draining his own land withdraws from an adjoining owner, claiming under the same grantor, the support of water theretofore beneath the land of that owner, and thereby causes the surface of that land to subside, is not liable for the injury inflicted, unless the act of draining is absolutely in derogation of the special purpose for which the land was originally granted to the adjoining owner.

A deed of conveyance of land for building purposes contained a covenant by the grantee to build to secure the rent reserved :—

Held, that the adjoining owner who claimed under the same grantor, was, nevertheless at liberty to drain his own land, although the result of his doing so was to cause a subsidence in the surface of the land of the first grantee.

The owner of a piece of land, close to Manchester, granted it in fee in 1835, to S. H. for building purposes, subject to a chief rent. S. H. in April, 1864, granted a portion of it, which was of a wet and spongy character, to C. in fee for similar purposes, subject to a similar rent. In the same month C. mortgaged this portion to the plaintiff, who entered into possession. The original deed of conveyance from the owner to S. H. and also that from S. H. to C., contained covenants by the grantees respectively to build a sufficient number of messuages to secure the rent reserved. Some cottages were afterwards built by the plaintiff on his portion of the land, but before their erection nothing had been done with the land, either by draining or otherwise, to make it more suitable to bear the weight of the cottages. In June, 1864, S. H. conveyed the adjoining land, being the other portion of the land originally granted to him in 1835, to E., and by successive conveyances it subsequently became vested in certain trustees for the purpose of erecting a church thereon. The defendant was the builder employed by them to carry out this object. In order to secure the safety of the church, it was necessary for the defendant to excavate deeply, and during the progress, and in consequence of this operation, the wet and spongy land on which the plaintiff's cottages were erected was drained and subsided, and the cottages were cracked and injured. The land would have subsided even if no buildings had been erected on it. In an action by the plaintiff to recover damages for these injuries :—

Held (affirming the judgment of the Court below), that he was not entitled to recover.

ERROR on the judgment of the Court of Exchequer given in favour of the defendants on a special case.

The plaintiff is the mortgagee in receipt of the rents of certain

land with some cottages built thereon, situated in Ely Street, Hulme, in the city of Manchester. The defendant is a builder, and in the latter part of the year 1867 made the excavations for building, and built, a church on some land adjoining the plaintiff's. The land on which the church was built and that of the plaintiff, originally belonged to the same owner. He conveyed it in 1835 to S. H., for building purposes subject to a chief rent. S. H., in April, 1864, conveyed the plaintiff's portion to C. for similar purposes, and in the same month C. mortgaged it to the plaintiff. The conveyance from the original owner to S. H. and from S. H. to C., contained covenants on the part of the grantees respectively, to build a sufficient number of messuages or dwelling houses to secure the rent reserved. Some cottages of very bad construction were afterwards built on the plaintiff's land, but before they were erected nothing was done either by draining or otherwise with the land, which was of a wet and spongy character, to make it more suitable to bear the weight of the cottages. In June, 1864, S. H. conveyed the adjoining land, which was of a similar character, to E., and by successive assignments it subsequently became vested in certain trustees for the purposes of erecting a church upon it. The defendant was the builder appointed to carry out this object. In order to secure the safety of the church, it was necessary for the defendant to excavate down to the firm soil, and, during the progress of this operation, the wet and spongy land on which the plaintiff's cottages were erected was drained and its surface subsided, and the cottages were thereby cracked and otherwise damaged. The subsidence was solely attributable to the defendant's excavations, whereby the underground water which had previously supported the land was withdrawn. The land would have subsided even if no buildings had been erected on it. The defendant had not been guilty of any negligence. The question for the opinion of the Court was, whether under these circumstances, the plaintiff was entitled to recover from the defendant the damages occasioned by the tapping and drawing off the water from his land.

The case was argued in the Court of Exchequer, on June 20th, 1868, by *Holker, Q.C.*, for the plaintiff, and *Quain, Q.C.* (*Crompton* with him), for the defendant.

1869

POPPLEWELL v. HODKINSON.

The Court (Martin, Bramwell, and Channell, BB.), gave judgment for the defendant. They were of opinion, 1st, that the defendant was entitled to make the excavations which had caused the damage complained of; and, 2ndly, that even assuming that the plaintiff would primâ facie have had a right to the support of the underground water, he could not under the circumstances of the case recover. He had built his cottages without taking any precautions to make his land fit to bear them, and was therefore not in a position to complain of the defendant's act. On this judgment the plaintiff brought error.

Holker, Q.C., for the plaintiff. It must be admitted that according to *Chasemore* v. *Richards* (1), and other cases, a man cannot claim a right to subterranean water as such. But just as he has a right to the support of soil adjacent to his own, he has a right to the support of water. The right to running water and to support from water are totally distinct: see per Lord Campbell, C.J., in *Humphries* v. *Brogden* (2), commenting on *Acton* v. *Blundell.* (3) Here, moreover, the plaintiff is entitled to recover upon two grounds:—First, because the land of his employers and of the plaintiff was originally the property of the same owner, who granted a portion of it to the mortgagor of the plaintiff *for building purposes*, and took a covenant from the grantee that buildings should be erected to a value sufficient to secure the chief rent. This covenant he was bound to leave the plaintiff in a position to perform, "for no one can derogate from his own grant." In *Caledonian Railway Company* v. *Sprott* (4), it was laid down that if a grant were made for building purposes, there would be an implied warranty for support, both subjacent and adjacent. Suppose marshy land is let to a railway company and a railway is made across it (as across Chatmoss), it could scarcely be contended that the owner would be at liberty to drain the part remaining to him in such a manner as to cause the line built on the land let to subside; yet such a case is strictly analogous to the present. Secondly, because, even apart from the terms of the conveyance under which he claimed, the plaintiff is entitled to the support of

(1) 7 H. L. C. 349; 29 L. J. (Ex.) 81. 5 Jur. N.S. 673.
(2) 12 Q. B. at p. 753.
(3) 12 M. & W. 324.
(4) 2 Macq. 449. 2 Jur. N.S. 62

1869

POPPLEWELL v. HODKINSON.

subjacent water, at least, so far as his own land without the superincumbent buildings, is concerned; and the arbitrator has found that the effect of the defendant's operations would have been to cause a subsidence of the plaintiff's soil, even although no buildings had been there. In this view of the case, therefore, the fact of the plaintiff not having taken proper precaution before building his cottages, becomes immaterial.

[COCKBURN, C.J. What right, independently of the principle that "no one can derogate from his own grant," can a man have to prevent his adjoining owner draining his own land? If, in the process, the adjoining owner subtracts underground water from his neighbour, can that alone give a cause of action?]

The maxim, "Sic utere tuo ut alienum non lædas" applies. In *North Eastern Railway Company* v. *Elliot* (1), Wood, V.C., decided that a railway company were not entitled to the additional support furnished by a drowned mine, but only because the water was, to the knowledge of the plaintiff, only accidentally in the mine and not naturally; and he intimates that the defendant might have been called on to guarantee the *natural* state of the soil. (2)

[HANNEN, J., referred to the report of the same case in the House of Lords. (3)]

The decision in the House of Lords does not conflict on this point with that of the Vice-Chancellor. [He also cited *Earl of Lonsdale* v. *Littledale* (4), where the declaration which was referred to with approval in *Humphries* v. *Brogden* (5), was for the removal of support by water: and to *Bonomi* v. *Backhouse*. (6)]

Quain, Q.C. (*Crompton* with him), for the defendant, was not called on.

COCKBURN, C.J. We are all of opinion that the judgment of the Court below ought to be affirmed. Although there is no doubt that a man has no right to withdraw from his neighbour the support of adjacent soil, there is nothing at common law to prevent his draining that soil, if, for any reason it becomes necessary or con-

(1) 1 J. & H. 145; 29 L. J. (Ch.) 808. 6 Jur. N.S. 817

(2) 1 J. & H. at p. 155; 29 L. J. (Ch.) at pp. 813, 814. 6 Jur. N.S. 820

(3) 10 H. L. C. 333; 32 L.J. (Ch.) 402. 4 Jur. N.S. 535.

(4) 2 H. Bl. 267.

(5) 12 Q. B. at p. 742.

(6) E. B. & E. 622; 27 L. J. (Q.B.) 378. 4 Jur. N.S. 1182.

1869

POPPLEWELL v. HODKINSON.

venient for him to do so. It may be, indeed, that where one grants land to another for some special purpose, for building purposes, for example, then, since according to the old maxim a man cannot derogate from his own grant, the grantor could not do anything whatever with his own land which might have the effect of rendering the land granted less fit for the special purpose in question than it otherwise might have been. In the case put by Mr. Holker with regard to Chatmoss, possibly, therefore, his observations might be well founded. If the owners of that moss were to drain it to such an extent as, by the amount of water drawn off, to loosen the foundations of the railway which runs across it, and for the purpose of constructing which they had sold a portion of it to the railway company, that might be an act in derogation of their own grant, and one, therefore, for which they might properly be made responsible. But, however this may be, the principle on which the owners would be liable, if at all, is not applicable in this case. For, although it is true that the plaintiff's land and the land which has been drained once had a common owner, and although the plaintiff's land was, in a certain sense, conveyed to him for building purposes, at all events, so far as the stipulation to build, to secure due payment of the perpetual rent-charge, goes, yet there is nothing to warrant the inference that there was an implied condition in the grant to prevent the defendant from doing with the adjacent land what was really incidental to its ordinary use, namely, draining it in order to render it more capable of being adapted to building purposes. Indeed, when we remember that the land was close to an important and populous town, and that there was, therefore, every probability of its being built upon, the plaintiff, we may infer, must have had strong reasons for supposing that it would be so built upon, and, consequently, would be effectually drained, if the nature of the erections proposed to be put upon it should render that operation necessary. It so happens that a church has been built there, and it was essential, the buildings being large and heavy, to drain the land deeply to get a secure foundation. Now, the plaintiff cannot complain of this, for he had no right to suppose that the adjacent land would be used for the erection of such cottages as he had himself erected, or of other buildings requiring equally little support. Seeing, then,

that there was no implied condition that the grantor in this case would not drain, there was no obligation on him or those who claim through him not to drain, to such an extent as the nature of the building to be erected rendered safe and desirable. Such an obligation can only arise out of the rule that a man cannot derogate from his own grant, and, as in this grant, there is in our opinion no such obligation, either express or implied, our judgment must be for the defendant. I should add that the judgment of the House of Lords in *Elliot* v. *North Eastern Railway Company* (1) entirely supports the view we take of this case.

KEATING, LUSH, HANNEN and BRETT, JJ., concurred.

Judgment affirmed.

Attorneys for plaintiff: *Scott & Co.*
Attorney for defendant: *E. Randall.*

(1) 10 H. L. C. 333; 32 L. J. (Ch.) 402.

END OF EASTER TERM.

CASES

DETERMINED BY THE

COURT OF EXCHEQUER

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

TRINITY TERM, XXXII VICTORIA.

1869
May 25.

HOLMES *v.* THE NORTH EASTERN RAILWAY COMPANY.

Negligence—Licensee—Invitation—Customer.

At the defendants' station at C. it was the habit to unload coal wagons by shunting them and tipping the coal into cells; it was also the practice for the consignees of the coal, or their servants, to assist in the unloading, and for that purpose to go along a flagged path by the side of the wagons. The plaintiff was consignee of a coal wagon, which could not be unloaded in the usual way on account of all the cells being occupied. With the permission of the station master, he went to his wagon, which was shunted in the usual place, took some coal from the top of the wagon, and descended on to the flagged path. The flag he stepped on gave way, and he fell into one of the cells and was injured:—

Held, that, although not getting his coal in the usual mode, the plaintiff was not a mere licensee, but was engaged, with the consent and invitation of the defendants, in a transaction of common interest to both parties, and was therefore entitled to require that the defendants' premises should be in a reasonably secure condition.

ACTION for negligence tried before Cleasby, B., at the York spring assizes.

At the East Cowtan railway station, on the defendants' line, wagons consigned to that station with coal or lime are shunted on

to a siding, and there unloaded by means of drops or cells, into which the contents of the wagons are shot. There is but one porter at the station; and it is customary for the consignees of the goods, or their servants, to assist in the operation of unloading, and for that purpose to pass along a flagged way, which runs by the side of the shunted wagons, and above the cells into which they are unloaded.

A coal wagon was consigned to the plaintiff, a farmer in the neighbourhood, and was shunted on to the siding, but could not be immediately unloaded, no drop being vacant. On the 16th of September, 1868, the plaintiff, being in want of coals, went himself to the station and asked the station master whether his coal could not be shot. The station master replied that some lime must first be removed. The plaintiff then said he must have some of the coals, and would get on to the wagon and take what he needed thence. The station master made no reply, and the plaintiff, with his servant, proceeded towards the wagon, got upon the buffer, took some coal from the top of the wagon, and then descended on to the flagged way. The flag he stepped upon being worn, gave way, and the plaintiff was thrown to the bottom of the cell, and injured. A verdict was found for 75*l.*, with leave to the defendants to move to enter a verdict for them, on the ground that there was no evidence of negligence. A rule having been obtained accordingly,

Digby Seymour, Q.C., and *Bohn*, shewed cause, and contended that the consignees of coal being accustomed, with the consent of the defendants, to assist in unloading their wagons, they came there in the way of business, and the defendants were under an obligation to them to provide them with a secure mode of access: *Indermaur* v. *Dames* (1); that the plaintiff, though not engaged in unloading his wagon in the customary way, was doing what was equivalent to it, and acting as he did with the sanction of the defendants' station master; that he was therefore equally entitled to require that the way should be secure: *Nicholson* v. *Lancashire and Yorkshire Railway Company* (2); but that, even if he were treated as a mere licensee, he would be entitled to recover, for that the

(1) Law Rep. 2 C. P. 311.

(2) 34 L. J. (Ex.) 84.

1869

HOLMES v. NORTH EASTERN RAILWAY CO.

condition of the flagged path made it a trap which he could not discover or avoid.

Overend, Q.C., and *Kemplay*, argued in support of the rule; and, admitting that the defendants would perhaps have been under a liability to the plaintiff if he had been engaged in unloading his wagon in the ordinary way, contended that he was departing from the only condition under which, in any view, he could be held entitled to impose a liability on the defendants; he was not following the course of business, but getting a portion of his coals from the wagon for a special emergency in a particular way; if any liability existed in the ordinary case it would only be by assuming that the assistance of the consignee in some way formed part of the contract to deliver, but the plaintiff's act was not that of a man assisting at the delivery, but of a man availing himself for his own purposes of a mere permission, which was so far from being an invitation, that it was only the absence of a distinct refusal: *Southcote* v. *Stanley* (1); *Griffiths* v. *London and North Western Railway*. (2)

KELLY, C.B. This rule must be discharged. [After stating the facts of the case, the learned judge proceeded]:—It is admitted that if the accident had occurred whilst the plaintiff was on his way for the purpose of unloading his wagon into a cell in the ordinary manner, he could have maintained an action; but inasmuch as he did not go there for the purpose of unloading his wagon, and did not unload it in the usual way, it is said that the case is different, that he was a mere volunteer. There is no doubt as to the nature of the conversation between him and the station master, and that, although no express permission was given, neither was there any prohibition; and on his saying that he was about to get his coals in this manner, he was not prevented from proceeding along the flagged way for that purpose. Now there being a duty on the defendants to keep the way in such a secure condition as to enable persons coming to assist in unloading the wagons in the ordinary way to pass safely, so that they would be liable to such persons for the consequences of its insecurity, the question is only whether they were not equally under a duty to the plaintiff, when, instead of unloading his wagon by tipping, he did the same thing by trans-

(1) 1 H. & N. 247; 25 L. J. (Ex.) 339. (2) 14 L. T. (N.S.) 797.

ferring the coals by hand from the wagon into his own cart. In my opinion, there is no difference. The way was used by the plaintiff for a purpose connected with the performance of the defendants' contract with him, and that he was effecting that purpose, with the consent of the defendants, in an unusual manner, can make no difference in their duty to him.

BRAMWELL, B. I agree that this rule should be discharged; but I have had considerable doubts, and am not wholly free from them. If the plaintiff had gone where he did by the mere licence of the defendants, he would have gone there subject to all the risks attending his going; as for instance, if he went there to see something that was going on in a neighbouring field. If, therefore, this had been the first occasion of such an errand, he would have had no claim. But many people had been in the habit of going to unload their wagons by tipping, and it became a practice, so that consignees might consider it as part of their contract to go and assist in that operation. I have had great doubt whether all such persons were not mere licensees, and I have that doubt still; for the defendants might at any time say to them, "you have no right to go there," and prevent them from doing so. Still I think they come within the description of persons invited to go there, in the same sense in which the public are invited to walk into a shop. They are persons who are, in effect, told that they may safely do that which it is for the convenience of both parties to have done. *Nicholson* v. *Lancashire & Yorkshire Railway Company* (1) is in favour of this view. There it was held that the defendants' servant having told the passengers on their way out to "go on," was evidence for the jury of an invitation to them to leave the defendants' premises by the way they did; and that the persons who were thus invited to go out by another than the usual way, were not to be considered as mere licensees, but as persons who were, for the convenience of themselves and of those who invited them, licensed to go out in that mode. Therefore, though not without misgiving, I think that persons going to assist in tipping their wagons were not mere licensees; and indeed it was not denied that if the plaintiff had gone for that purpose he would have had a cause of action. Then if that is so,

(1) 34 L. J. (Ex.) 84.

1869

HOLMES v. NORTH EASTERN RAILWAY CO.

and if no extra burden was imposed upon the defendants by his mode of unloading the coal, was any difference caused by the fact that he went to unload it in another way? On that again I hesitated for some time. But I think the invitation was not an invitation to unload by tipping, but was an invitation to unload generally. It would perhaps sound too much like a quibble to say that there would be a cause of action in the one case and not in the other. On the whole, therefore, though not without hesitation, I concur in discharging this rule.

CHANNELL, B. I also have not been free from doubt, but I concur in discharging this rule. The real difficulty is not in ascertaining what is the law, but in applying it to the facts of the case. I quite concur in the rule laid down by the cases, that where a person is a mere licensee he has no cause of action on account of dangers existing in the place he is permitted to enter. Now in one sense the plaintiff was a licensee, but he was not a *mere* licensee, and the word *mere* has a very qualifying operation. We must infer from the silence of the station-master that he acquiesced in the plaintiff's going on to the siding for the purpose of getting coal from his wagon in the way in which he did get it, and we are not to suppose that any additional risk was caused by his mode of descending from the buffer. The plaintiff, then, went there with the consent of the station master for the purpose of getting his coal, but in what relation did the defendants stand to that purpose? In the delivery and receipt of the coal there was a common interest in them and in the plaintiff, since they were bound to deliver it; and this prevents the case from being that of one who is a mere licensee. The plaintiff was entitled to delivery; and the station master must be taken to have allowed him to take delivery, not of the whole of his coal at once, but of a part of it in that way. I agree, therefore, that the rule must be discharged.

CLEASBY, B. I am also of that opinion. The defendants are carriers for hire of coal, which they are bound to deliver to the consignees. No particular mode of delivery is stipulated for; but there is a general duty on the defendants to deliver, and on the consignees to accept delivery. The latter, however, must go to the defendants' premises and receive there the coals consigned, and

the usual mode of delivery adopted was for the wagon of coals to be shunted, and the coals shot through a hole into the wagon of the consignee placed in a cell beneath. But it was further the practice, that in this delivery the consignees were not only not excluded from the defendants' premises, but they habitually assisted in the delivery, and to do so must walk along the flagged path in question. Under these circumstances there was an obligation on the defendants, to that part of the public who were consignees of coal by their line to that station, to see that the flagged path should be, so far as they could command, in a reasonably fit state to be used with safety. So far, I think, the case is without doubt. But here the ordinary mode of delivery was departed from; then, does that make any difference? Now I cannot but regard this as a part delivery, not a mere voluntary permission to the plaintiff to get his coal. He was entitled to receive delivery. The defendants' drops were all occupied, and might be so for some time. The plaintiff did not want immediate delivery of the whole, but he did want a delivery of some part. In a fair way of looking at the case, therefore, the coals were to be partially delivered to him, or he was to be allowed to obtain partial delivery of them, in this way. To do so, he must go along the flagged path; there was, therefore, an obligation on the defendants to him that the path should be in a proper condition. There is the same obligation as regards the path, whether one mode of delivery was adopted or another. The question of a mere licence does not arise; for as soon as you introduce the element of business, which has its exigencies and its necessities, all idea of mere voluntariness vanishes.

Rule discharged.

Attorneys for plaintiff: *Doyle & Edwards, for Nixon, Darlington.*
Attorneys for defendants: *Williamson & Hill.*

1869
May 29.

HARVEY AND OTHERS *v.* THE MAYOR AND CORPORATION OF LYME REGIS.

Tolls—Harbour—Construction—Goods "landed."

The defendants were empowered by a local act to levy tolls on all goods *landed* within their harbour. In pursuance of a practice which had continued for many years, stones brought along the coast into the harbour were shot from the plaintiffs' boats on to the shore, below high-water mark, and remained on the spot where they were deposited till they were shipped for exportation from the harbour:—

Held, that the stones were not *landed* within the meaning of the act.

ACTION for trespass to a boat.

Avowry by defendants, claiming a right to distrain the boat for nonpayment of tolls due from the plaintiffs, its owners, to the defendants, in respect of goods landed from the boat within the defendants' harbour.

Second plea to the avowry, denying the landing of goods from the boat within the harbour. Issue.

The defendants claimed toll under their Harbour Act (1 & 2 Geo. 4, c. xcix), which by s. 1 empowered them to demand and levy on "all ships, vessels, and boats, of whatsoever description, which shall come into or use the said cobb or harbour, or shall lie at anchor within the said cobb or harbour, and for all goods, wares, and merchandize, and other things landed or shipped within the same cobb or harbour as aforesaid," the duties set forth in Schedules A. and B. to the act. Schedule A. contained "rates of tonnage" on vessels of ten tons and upwards coming into the harbour, and on vessels laid up unemployed within the harbour. Schedule B. contained the "rates on merchandize," including in the list, "for every ton of rough free-stone, limestone, or other stone, 6*d*."

The cause was tried before Byles, J., at the last spring assizes at Dorchester. The facts were that, in pursuance of a practice which had long been followed by the permission of the defendants, stones were shot from the plaintiffs' boat on a spot within the harbour appointed for that purpose by the corporation, and lying below high-water mark. The stones thus deposited were brought in boats along the coast from the neighbouring quarries; they remained where they were shot until they were put on board vessels for

exportation from the harbour; and on this exportation, duty was paid according to the tonnage rates in Schedule B. The defendants now claimed duties on the stones thus shot, as upon goods landed. A verdict was entered for the defendants, with leave to the plaintiffs to move to enter the verdict for them.

A rule having been obtained accordingly,

Cole, Q.C., Archibald, and *Bullen,* shewed cause. These goods are landed within the meaning of the act. Under the statute of 1 Eliz. c. 11, s. 2, which (to avoid frauds on the revenue) prohibited persons to "take up, discharge, and lay on land" goods, except between the hours of seven in the morning and four in the afternoon, and imposed the penalty of forfeiture, it was held in *Leak* v. *Howel* (1) that the defendants were not liable to the forfeiture where their goods were discharged into lighters at noon, brought to the sea-shore aquâ ab inde refluxâ (and, therefore, below high-water mark) at two, and the greater part put on land before four in the afternoon. It must, therefore, have been held that all the goods were "laid on land" before four, although partly unladen after; and the case is so treated by Hale on Customs, c. 23, p. 228. It is not necessary, however, to contend that any kinds of goods would be landed within the statute if they were deposited on shore in the same manner as these stones, for the word has not an absolute meaning, but varies according to the subject-matter; and with regard to the goods in question, neither the mode of discharging them, nor the place where they are discharged, is inappropriate or unusual. The stones no longer float or are carried, but they are, in fact, discharged, and come in contact with the land, and are placed upon it to remain there. They are, therefore, within the very words of the act. It might even be reasonably contended that if they were transhipped within the port they would have been landed, within the meaning of the act, having made the port a new point of departure; but it is not necessary to go so far, for here the words are clearly satisfied, and the intention is also complied with.

Kingdon, Q.C., and *Lopes,* in support of the rule. These stones cannot, according to the ordinary use of language, be said to have

(1) Cro. Eliz. 533.

1869

HARVEY v. MAYOR AND CORPORATION OF LYME REGIS.

been landed by being placed in the sea, where they are inaccessible from the shore and where the tide may carry them away. A fisherman lands his fish when he gets them finally into his custody; and a merchant lands his goods when he can carry them at will to his warehouse. It is evident the act uses the word in this common sense, as is shewn by this, that goods "landed" are opposed to goods "shipped." The case cited has no bearing; the words of the acts are different; the decision was a decision against a penalty; and it was plain that the intent and meaning of the act were in substance complied with.

KELLY, C.B. This rule must be made absolute. The question is, whether the defendants are, under the circumstances of this case, entitled to tolls as on the landing of stones within the limits of their port. By the words of the act the defendants are "entitled to levy tolls on all ships, &c., which shall come into or use the said cobb or harbour, or shall lie at anchor within the said cobb or harbour, and for all goods, &c., landed or shipped within the same cobb or harbour, as aforesaid." The defendants are thus entitled to tolls, substantially, for the use of the harbour. And the tolls are levied in three cases: first, for vessels of ten tons' burden entering the port (for the schedule limits the duties to vessels of that tonnage); secondly, for goods landed; and thirdly, for goods exported. Now the question is whether, under the circumstances of the case, these stones were landed within the second head of toll; and the defendants must, to entitle themselves, shew clearly that this is a landing not only within the words, but within the spirit and meaning, of the act. The ordinary meaning and purport of the words is perfectly clear, namely, that tolls are to be paid on goods substantially imported; that is, in fact, carried into the port for the purpose of the town and neighbourhood. The goods in question, no matter whether brought by land or by sea from the place where they were produced, are destined, not for importation, but to be shipped and exported from the place where they lie; and to say that they are liable not only to a shipment, but also to a landing, toll, where, under ordinary circumstances, the duty on shipment can only become due where there is no landing at all, is to graft upon the expression "landed" a meaning that was never

intended, and which would make the toll payable immediately that the stones touched the ground within the harbour for whatever cause. But, further, take the case of stones brought into the harbour in a lighter, and remaining on board until they are transferred from the lighter to a vessel for exportation. Could it be said that the goods were landed within the meaning of the act where the lighter floats, and the stones never, in any sense, touch the land? This would be to strain words imposing a tax beyond anything in the contemplation of the legislature. The lighter, when it goes in, pays (provided it be of the specified tonnage) for the use of the port; and, whether the goods come by land or by water, the defendants take all the toll it was intended they should take, and which is all they could by possibility take if the goods were brought by land. Can, then, this use of the soil of the harbour, by the permission of the defendants, which effects the same end, make this a landing within the act? They may, if they please, either continue or cease to be content to include this privilege within the remuneration which is provided for them by the act; but to make a claim for remuneration into a claim of tolls is to convert the harbour into a purpose to which it was not destined by the act, and for which no provision is made. Looking at the circumstances of the case, and the three cases for which tolls are provided by the act, the intention of the legislature is obvious; and to impose a toll on goods thus placed on the shore, even though it might be within the words, would be against the spirit and meaning, of the act.

Reference has been made to the case of *Leak* v. *Howel* (1), but that case has no application to the present question. There, the Crown being entitled to certain duties on imported goods, the law was evaded, and the Crown defrauded of its dues, by the secret landing of goods at unseasonable hours. The act upon which the decision proceeded was passed to put a stop to that practice, by imposing a penalty where goods were brought to shore and dealt with not within the hours made lawful by the act. It was not a question of toll at all, but a question whether, within the meaning of that act, the goods were *laid on land*. The nature and purpose of the acts therefore differ, and the words used also differ. But it

(1) Cro. Eliz. 533.

1869

HARVEY v. MAYOR AND CORPORATION OF LYME REGIS.

further appears that the goods were not only discharged into barges, and brought to shore, and laid on land in fact, but were substantially delivered on land within the permitted hours. There was, therefore, not only a landing literally, but also a landing within the sense and meaning of the act. Here, however, the goods were not landed to be taken in to the land at all; they are not, therefore, within the act.

BRAMWELL, B. I am of the same opinion. The question is, whether the stones were landed within the meaning of the act, so that the defendants could claim toll for them; and the reason of the thing is against so holding. The statute imposes tolls on vessels for the protection and shelter of the harbour, and the convenience they experience in coming in there. It also imposes a toll on goods landed, that is, on the owner of the goods, for the benefit and convenience experienced by the landing of his things, supposing him to land them on a quay or on the shore whence they can be drawn up inland. But the case shews facts the contrary of this; because here the stones were not taken to the land itself, nor were they put in a place from which, by the owner's will and pleasure, without an act of trespass, they could be taken up to the land. Therefore the reason of the act is contrary to imposing a landing duty on the plaintiffs.

Considering the question as a matter of words, were the goods landed? What is landing? It is putting on the land. Where does the land begin? Where the sea ends. Where does the sea end? At high-water mark; above the place where the goods were deposited. We must say that the goods were landed in the sea. It would certainly be strange if the captain of a steamboat were to say that he had landed his passengers, if he made them get out in three feet of water. Yet I do not say that the goods might not be said to be landed, if they were put there with the means and right of taking them up on to the land. As a matter of good sense it might perhaps be, that though goods would not be landed in the usual sense of the word until they had got to the land, yet as soon as in any manner they had reached what might be considered as the end of their transit, that might be called a landing. Suppose, however, the goods were taken out of the

lighter within the harbour where the water never left the ground, for the purpose of being taken to the land, would they be landed, though below the limits of the lowest low-water mark? I say again, if they were so placed that they could be fetched thence by the owner into the country, it might perhaps be a landing within the spirit of the act; but not otherwise. But the present case is neither within the spirit and intent, nor within the words, of the act; it is no more a landing than a transhipment would be.

It is difficult to make the case cited an authority, for the words of the acts differ. Again, under the act then in question the offence could not be committed unless there was a failure in both conditions, the being discharged and being laid on land; and it is clear that the whole offence was not committed before four o'clock. No doubt, however, the case puts it on the ground that the goods were laid on land before four; and there may have been sufficient reason for that, for it may be that carts could come there and carry the goods away, so that we may regard the place as a regular landing-place.

I doubt, however, whether in strictness the question of construction arises; for it is here found as a fact that this corporation has for forty years permitted the stones to be laid at this place without toll. They have therefore furnished evidence against themselves. Having allowed the stones to remain there on those terms, they now revoke their permission. But they have, in fact, licensed what the plaintiff did, and it was competent to the plaintiff to say, "You have authorized us to lay the stones there, and have in effect given us to understand that toll will not be claimed."

CLEASBY, B. I also agree that this rule must be made absolute. It is not necessary to decide whether the goods, if liable to toll on landing, would be liable again on exportation; but to maintain their present contention, it is necessary for the defendants to shew a landing. My opinion is, that the goods are here not landed; they are only, by the permission of the defendants, shot into the water, and remain there till they are afterwards carried away by sea. They might be taken into the land, in which case tolls would accrue upon them; but the intention is not that they shall be so taken up, but that they shall be put into vessels and carried out

1869

HARVEY v. MAYOR AND CORPORATION OF LYME REGIS.

of the port seaward. With that object power is given to shoot the stones. They are not landed in the ordinary sense, but are shot into the water, and the effect of the tide receding is that they appear upon the shore. Now, on the construction of the word by itself, it is not a violent interpretation to say that the goods are not landed by being placed where, from time to time, they are in the water. But, on referring to the schedule, the inference is strong in favour of the plaintiffs; for the goods on which tolls are to be levied are goods shipped or landed. Now these goods, though put on the land, were not landed in a similar sense to that in which goods are shipped when they are put on board ship, because they are conveyed there for the particular purpose merely of remaining there until, in the course of their transit, they are placed on board ship.

As to the case cited, if it were applicable, we must suppose that if these stones were to remain in a lighter till it took the ground, they would be landed, and must pay toll. That cannot be. But what has actually been done is a mere substituted form of that, for the stones are merely shot, to remain where they are till carried away.

CHANNELL, B. I do not propose to dissent from the judgments which have been delivered by my Lord and my learned Brothers; but I have great doubts on the case; and but that, the point having been reserved at the trial, the defendants will have a right of appeal without the expression of my dissent, I should have asked for time to consider.

It is perfectly clear that, if Mr. Cole's contention is correct, he must contend for a right to both tolls, one on landing and one on shipping; and in fact he contends for both. We ought not to be influenced in our judgment by the fact that the practice here pursued has gone on for a long time under an arrangement with the defendants. Now that the question has been raised, it remains only to see in what sense the act is to be understood. Neither am I influenced by the case cited, which would bind us only if the words of the act on which it was decided were identical with, or at least equivalent to, those of the present act. They are not so in fact; and there may also be other grounds on which

that case may have been decided. So far I agree in the views of the rest of the Court.

We are to determine, then, whether these stones were landed within the act. In one sense, at least, they were landed. They were taken out of the craft in which they came, and they came into contact with the land within the defendants' cobb. They were no longer on board ship; but they had been unloaded, and were in contact with the land. Why, then, were they not landed within the meaning of the act? I do not find that the act requires anything more than that the goods should be "landed within the cobb or harbour." There is nothing about their going into the country. If they are on the land within the cobb, the literal meaning of the act is complied with, and I think also the spirit. And I say this notwithstanding the rule that an act imposing tolls must be strictly construed. The jury have found that the place was within the cobb; there is nothing to lead me necessarily to any conclusion as to whether the stones were only placed there for the purpose of deposit, and with a view to reshipment, or to remain till such an amount had been accumulated as was fit to be taken away. The doubt suggested is, whether this is a landing in the contemplation of the act, because the goods do not reach the inland country, or some point above the limits of the harbour, where the goods could be taken away by the owner. But I find no words in the act requiring me to adopt that construction, and I do not seek to be wise above what is written.

Rule absolute.

Attorneys for plaintiffs: *Dangerfield & Fraser, for Symonds, Dorchester.*

Attorneys for defendants: *Hopwood & Sons.*

1869
June 12.

HOPKINS *v.* WARE, Executor.

Payment by Cheque—Presentment of Cheque—Delay—Laches.

Post 314

A creditor who takes from his debtor's agent on account of the debt the cheque of the agent, is bound to present it for payment within a reasonable time; and if he fails to do so, and by his delay alters for the worse the position of the debtor, the debtor is discharged, although he was not a party to the cheque.

Action against the defendant as executor of Robert Ware, on a promissory note for 250*l.*, made by Robert Ware, with counts for money lent and on accounts stated.

Plea 3: Payment. Issue.

The case was tried at the last Bristol spring assizes, by consent, before Montague Smith, J., without a jury. The evidence was as follows:—The testator borrowed of the plaintiff 250*l.* on his promissory note. On the 9th of May, 1868, the testator being then dead, G. L. Lang, the defendant's solicitor, forwarded to the plaintiff his own cheque for 258*l.* 3*s.* 6*d.*, the amount due on the note for principal and interest, and the plaintiff returned her receipt for the amount. The plaintiff, who lived at Owestry, in Gloucestershire, retained the cheque till the 6th of June, when it was forwarded through a London bank for presentation. On the 9th it was presented, and was dishonoured. Notice of dishonour was given to the defendant on the following day, and application was afterwards made to him for payment, which he refused.

It appeared from the evidence of the manager of Stuckey's Bank, at Crewkerne, in Somerset, on which the cheque was drawn, that on the 13th of May, 1868, Lang's account was overdrawn to the amount of 128*7l.*, and that between the 13th of May and the 6th of June he was never in funds to meet the cheque. The manager also stated that the account had for some years been overdrawn without adequate security, but that the overdraft was at this time covered by securities which had been brought in by Lang, without any request from the bank, in December, 1867; and also that Lang had banked there since 1859, and that no cheque of his had ever been dishonoured. He further stated that, if the cheque had been presented, he would not have paid it without communicating with

Lang, but that he could not say whether it would or would not have been paid in fact. Between the 13th of May and the 6th of June various sums were paid in by Lang, including a sum of 250*l.* on the 3rd of June, and cheques of his honoured, including one of 106*l.* paid without communication with Lang, and one of 200*l.* paid on the 22nd of May in consequence of a previous communication with him—the result being that on the 6th of June the overdraft had increased by 261*l.*

It was also proved by the defendant that Lang had in his hands, at the time the cheque was forwarded by him, 166*l.* 11*s.* belonging to the estate, and that on the 16th of May the defendant paid to Lang, at his request, the balance of 91*l.* 12*s.* 6*d.*

Upon these facts the learned judge found that there was a reasonable chance of the cheque being paid if it had been presented at the time, but no certainty of it; and a verdict was entered for the plaintiff, with leave to the defendant to move to enter the verdict for him.

A rule having been obtained accordingly,

Cole, Q.C., and *Bere*, shewed cause. It is clear that payment by bill or cheque is no discharge if the bill is dishonoured, and the creditor may still sue upon the original debt: *Puckford* v. *Maxwell* (1), or enforce his right of stoppage in transitu: *Owenson* v. *Morse.* (2) The only circumstance which will make it payment is that the cheque has not been withheld from presentation, and that in the mean time the fund has been lost in consequence of the delay: *Robinson* v. *Hawksford* (3); mere lapse of time (short of six years) without such loss is of no effect: *Alexander* v. *Birchfield* (4); *Laws* v. *Rand* (5), approving what was said in *Robinson* v. *Hawksford* (6), by Patteson, J. What is true of the bill or cheque of the debtor is equally true of payment by the cheque or bill of the agent: *Robinson* v. *Read* (7), even though it is given at the request of the creditor: *Everett* v. *Collins* (8), and though its non-presentment causes a loss of the fund: *Marsh* v. *Pedder.* (9) Moreover,

(1) 6 T. R. 52.
(2) 7 T. R. 64.
(3) 9 Q. B. 52.
(4) 7 M. & G. 1061, 1067.
(5) 27 L. J. (C.P.) 76.
(6) 9 Q. B. at p. 59.
(7) 9 B. & C. 449.
(8) 2 Camp. 515.
(9) 4 Camp. 257.

1869

HOPKINS v. WARE.

lapse of time has no effect if it be assented to by the debtor: *Alexander* v. *Birchfield.* (1)

Kingdon, Q.C., and *Pinder*, in support of the rule. The plaintiff knew from the circumstances that the defendant was interested in the payment of the cheque, and was therefore bound to present it without delay. If by her delay the defendant has suffered a loss he is discharged, and this is so laid down in *Robinson* v. *Hawksford*, where Patteson, J., says (2) that the holder is "bound to present so as to avoid any prejudice that might arise from the drawee becoming insolvent." It is so laid down in Byles on Bills, p. 19 (8th ed.) and the duty is the same with respect to a third party interested in the bill, as with respect to a party to the bill itself: *Smith* v. *Mercer* (3), shows this with respect to notice of dishonour, and the same reason applies to presentment. The facts here shew a loss caused by the delay; a loss, first, of the chance of the cheque being paid by the bank; secondly, of the further payment made to Lang by the defendant on the 16th of May; and, thirdly, of the chance that payment might have been obtained from Lang himself.

BRAMWELL, B. I am of opinion that this rule must be made absolute. [After stating the facts of the case the learned judge proceeded]:—My Brother Montague Smith has found upon these facts that there was a reasonable chance that the cheque would have been paid if it had been presented earlier. The defendant is therefore entitled to say that he has satisfied the plaintiff's demand by the cheque; for though a cheque, if it be duly presented and dishonoured, is no payment or satisfaction, there being no satisfaction unless satisfaction is provided by it in fact, yet it becomes given and taken, accepted and retained in satisfaction, if it be so dealt with as to entitle the giver of it to say, "you have not dealt with it as if I had an interest in it, but as if you were to deal with it at your pleasure, and by your mode of dealing with it you have caused me to sustain an injury." Has, then, the defendant sustained an injury by the mode in which the plaintiff has dealt with this cheque? He has suffered damage in two ways. First, he lost the chance of the cheque being paid; and secondly, he lost the chance of not paying Lang the 91*l.* which he would not have

(1) 7 M. & G. 1061. (2) 9 Q. B. at p. 55. (3) Law Rep. 3 Ex. 51.

paid if it had been duly presented and dishonoured. But upon this second head there may be some doubt. For though a cheque is a bill of exchange, yet when there is no indorsement it is not subject to the same rules with respect to immediate presentment. It may be doubted, therefore, whether there was any default before the 16th of May, when the whole of the defendant's money which was to cover this payment got into Lang's hands. There remains, however, the loss of the chance that the bank would have paid the cheque if it had been presented before the 9th of June. And there is the further fact that if the cheque had been presented and dishonoured at some earlier period, the defendant would have had an opportunity of going to Lang and demanding repayment from him. There is no reason to suppose that Lang was in such desperate circumstances that the defendant might not have got at least some portion of the sum from him; and in fact Lang did, as late as the 3rd of June, pay into the bank 250*l*.

Then was there an unreasonable delay? It is often difficult to describe to a jury what is such a delay, when there is no obligation to present at any precise time, as on the next day or the day after; but though it is difficult to draw a dividing line, it is not difficult to say in particular circumstances that a case is on one side of the line or the other. It might be that one week would be a reasonable period to allow, or perhaps two weeks, but it is unreasonable that three weeks should be allowed to pass without presentment. Therefore, without saying what would be a reasonable time, an unnecessary and unreasonable time was in fact allowed to elapse before the cheque was presented; and that delay caused a double damage; first, the loss of the chance of the cheque being paid, and secondly, the loss of the opportunity of obtaining redress from Lang in the event of the cheque being dishonoured.

Therefore, although the cheque was originally neither given nor taken in satisfaction, yet it was kept by the plaintiff and dealt with, as she had no right to keep and deal with it, except on the footing that it was her own, without recourse to the defendant. It therefore became her own, and the defendant was discharged.

CHANNELL, B. I am of the same opinion. Certainly when the cheque was remitted it did not operate as payment; it only did so,

1869

HOPKINS v. WARE.

if at all, on the duty to present in reasonable time being neglected. It is difficult to draw the line as to reasonable and unreasonable time. But I infer from the authorities, that if the holder of the cheque has not presented it when he might, but has unreasonably withheld presentment so that the situation of the maker is altered for the worse, the holder has thereby made the cheque payment; especially when he has treated it as owner; and with this view the retaining and the mode of dealing with the cheque is important evidence. The learned judge was here put in the position of a jury; the question, therefore, is limited to his finding. Now he finds that though there was no certainty, yet there was a reasonable chance, that, if the cheque had been presented at a certain time, it might have been paid. This, however, was not done; and afterwards Lang absconds. Therefore, besides losing the benefit of the chance, of a nature reasonably to be expected, that the cheque would be paid, he has also suffered damage in his relations with Lang. For considering Lang's credit with the bank, and that they had allowed him to overdraw his account, there was some chance that payment might have been ultimately obtained either from him or from the bank. Therefore, the position of the defendant was altered for the worse by the laches and neglect of the plaintiff; who must therefore be considered to have held and treated the cheque as her own, and made it payment.

Rule absolute.

Attorney for plaintiff: *H. J. Francillon, Dursley.*

Attorneys for defendant: *Surr & Gribble, for Nicholetts, South Petherton.*

CHAPMAN *v.* JONES.

1869
May 24.

Private Chapel—Chapel part of Parish Church—Pews—Great and lesser Chancels —Freehold of Inheritance—Immemorial User—Reparation—Prescription—Evidence.

The freehold of a chapel or lesser chancel may be vested in a private person, though such chapel or chancel forms an integral portion of, and is under the same roof with, a parish church.

The enjoyment of such a chapel or chancel, and the right to its exclusive use, is not necessarily annexed to a dwelling house.

Immemorial repair of a chapel or lesser chancel which is part of a parish church, coupled with other acts of ownership, is evidence of a freehold of inheritance in it being vested in those who have executed the repairs and exercised the acts of ownership.

DECLARATION: 1st count, that the defendant broke and entered a certain chapel aisle or private or lesser chancel of the plaintiff, connected with the parish church of Mottram, in the county of Chester, and there broke open the door of the said chapel aisle or private or lesser chancel, and spoiled the lock of the said door so as to prevent the plaintiff from entering the said chapel aisle or private or lesser chancel, and kept the plaintiff evicted therefrom. 2nd count, trover for goods, that is to say, locks.

Pleas (inter alia): 2. To 1st count, not possessed. 3. To 2nd count, traverse that the goods were the plaintiff's. Issue.

The parish church of Mottram is an ancient edifice originally erected 600 years ago. Adjoining the church, on the south side of the great chancel near the east end, is a chapel known as the "Staley or Stamford" chapel. Previously to the year 1858, it had been used and enjoyed, from time immemorial, by the lords of the neighbouring manor of Staley, the Earls of Stamford and Warrington and their predecessors. Staley manor is in Mottram parish, but does not include the site of the church and chapel within its limits. All necessary repairs of the chapel had always, from time immemorial, been done by the Earls of Stamford. The parishioners had never repaired it, but only the body of the church. On the wall there was and still is, a hatchment, more than a hundred years old, on which are the armorial bearings of the Earls of Stamford and Warrington, and beneath the hatchment is an inscription stating that the chapel "belongs to, and is repaired by the

1869

CHAPMAN v. JONES.

Earl of Stamford and Warrington, as lord of the manor of Staley." Successive earls had, moreover, exercised at all times various acts of ownership over it; e.g., by using it as a burying place for their kindred, and by occupying the pews within it either by themselves or their tenants of the manor, or by letting the pews from time to time to other persons; and they claimed to be the absolute owners of the freehold of the site o the chapel and of the chapel, and as such entitled to the exclusive use of and right of entry to it. No records exist to shew the origin or foundation of either church or chapel, but they are unquestionably coeval in date, and the chapel is under the same roof with, and an integral part of, the church. The outer wall of the chapel is the outer wall of the church also. In this wall is a door, through which there is access from the churchyard into the chapel, and thence, without any intervening obstacle, into the body of the church. The key of the door was, up to 1858, usually kept by the sexton, and the parishioners had been in the habit of using the door at different times to obtain access to the church. On one occasion, in 1853, in the absence of Lord Stamford, and without his knowledge or sanction, the vicar renewed the lock.

Lord Stamford, by an indenture dated the 22nd of January, 1858, granted to the plaintiff in fee the manor of Hattersley (also within the parish of Mottram), with the demesne lands therein and "all that free chapel or chapel of him the said earl, called or commonly known by the name of the Staley chapel, otherwise the Stamford chapel, situate in or adjoining the parish church of Mottram aforesaid, together with the pews, privileges, easements, members, and appurtenances thereunto belonging." The plaintiff, by virtue of this deed, claimed to be owner of the freehold of the chapel, and as such, entitled to an exclusive right to use the door. It was, in fact, used by others, but only, as the plaintiff alleged, by his permission as freeholder—the sexton being still allowed to have the custody of a key. The defendant, the vicar of the parish, on the other hand, claimed to enter as of right through the door, and in the assertion of his right removed the lock from it and passed through it into the church. This action was thereupon brought.

At the trial before Kelly, C.B., at the Cheshire spring assizes, 1869, the above facts having been proved, it was contended on the part of the defendant, first, that a private person could not have

a freehold in a chapel or lesser chancel of a church; and, secondly, that if he could it could not be conveyed in gross, but could only be had and enjoyed as appendant or appurtenant to some messuage or dwelling house within the parish; and it was suggested that the Earls of Stamford had enjoyed the use of the chapel as lords of the neighbouring manor and not otherwise. In support of this suggestion, reliance was placed particularly on the circumstance of the chapel being known as the "Staley" chapel, and also on the terms of the inscription on the hatchment in the chapel, stating it to belong to, and to be repaired by, the Earls of Stamford, as lords of the manor. The learned judge ruled against the defendant on both these points, and directed a verdict for the plaintiff with leave to the defendant to move to enter a nonsuit, the Court to be at liberty to draw inferences of fact.

A rule was obtained accordingly, upon the following (among other) grounds,—that there was no evidence to go to the jury of any exclusive right in the plaintiff as against the defendant to the door of the alleged chapel, and no proof that the said alleged chapel is not a portion of the parish church of Mottram; and also that the plaintiff had no legal right to the chapel, if there be one, inasmuch as it was and is appurtenant to the manor of Staley, and that the said manor and the manor house thereto belonging are still the property of Lord Stamford.

A. J. Stephens, Q.C., M'Intyre, and *B. Shaw*, shewed cause. The chapel in this case is, no doubt, in one sense, a part of the parish church of Mottram, but there is no legal objection on that account to its being the freehold of a private person. Chapels, though under the same roof with churches, can be, and frequently have been, held in fee simple by laymen, and treated strictly as private property. [He cited *Anon. Case* (1); *Fuller* v. *Lane* (2), Johnson's Vade Mecum, 6th ed. 177; 2 Nicolas Test. Vetust. 428, 478; Godolphin's Repertorium, 2nd ed. 145; Degge's Parson's Counsellor, 6th ed. 188; Ayliffe's Parergon, 165; 1 Stephens' Laws of the Clergy, 248—251]. In *Churton* v. *Frewen* (3), their character was recognized by Vice-Chancellor

(1) 3 Salk. 85. (2) 2 Add. 419.

(3) Law Rep. 2 Eq. 634.

1869

CHAPMAN v. JONES.

Kindersley, who, at p. 651, explains the mode of their creation. "It was," he says, "the custom in early times for the lord of a manor, when founding a church, to found with it a private chapel not annexed to his house but to the church itself, considering perhaps that it derived additional sanctity from being as it were made part of the church in appearance and close to the church; and it was a common practice for lords of manors and other men of note in the country, to obtain leave either from the pope or from the crown, or from the patron, the ordinary and the incumbent (and the lord of the manor would generally be the patron), to annex a chapel to an existing church." The chapels so founded or annexed were used for sepulture and private masses. They were repaired at the expense of the owner and not by the parishioners, and were exempt in most respects from ordinary ecclesiastical jurisdiction: 1 Johns. Vade Mecum, 270, 271; Winchelsey's Constitutions of Merton (1305) in 2 Johns. Canons at pp. 322, 325 (Oxford ed. 1851); and they were moreover used for purposes wholly inconsistent with the proposition that they must be part of the parish church because the two buildings are locally attached: 2 Inst. 489; Highmore on Mortmain, 2nd ed. 33; Book of Common Prayer prefatory Rubric, and 4th Rubric prefatory to the Communion Service. The case of *Griffin* v. *Deighton* (1) has no bearing on this question. There the vicar was held entitled as of right to enter the *great* chancel, which was part of the parish church itself and the place where a portion of the service was celebrated. Cockburn, C.J. (2), expressly alludes to the distinction which exists between such a place and a lesser chancel or chapel: Cripps, Laws of the Clergy, 4th ed. 449.

[KELLY, C.B. The cases and authorities referred to appear to decide that a lesser chancel or chapel may be held in fee by a private person. There remains the more important point whether it can be held except along with, and in respect of the occupation of, a dwelling house within the parish.]

There is no ground for supposing private chapels are necessarily appendant or appurtenant to a manor house or other residence. In fact, they usually are so, in their origin; and in the present case

(1) 5 B. & S. 93, s. c. in error, 108; 33 L. J. (Q.B.) 29, s. c. in error, 181.

(2) 5 B. & S. at pp. 105, 106; 33 L. J. (Q.B.) at p. 32.

the evidence tends to shew that the founder of the church and chapel, which are admitted to be coeval, was the lord of the neighbouring manor of Staley, who probably reserved the chapel site out of his grant of the land on which the church was built. But that site, especially as it is not within the manor, cannot be said to be necessarily appurtenant or appendant to it or to the occupation of the manor house. Similar chapels have frequently been separately dealt with. Thus in *Buxton* v. *Bateman* (1) an "aisle" was held to be well allotted in lieu of a donation. The fact of consecration cannot alter the general law as to freehold property: *Hillingsworth* v. *Brewster* (2); *Rennell* v. *Bishop of Lincoln* (3); Co. Litt. 385 a, 343 b; *Harpur's Case* (4); and here there is ample evidence that the chapel was Lord Stamford's freehold. The fact of immemorial repair alone, unless rebutted, is sufficient to raise a presumption to that effect: *Duke of Newcastle* v. *Clark* (5); and taken with the other circumstances of the case, such as the right of sepulture having been exercised, raises an almost irresistible presumption that the freehold of the chapel was in Lord Stamford: *Francis* v. *Ley* (6); *Day* v. *Beddingfield* (7); *Asher* v. *Whitlock* (8); *Davison* v. *Gent* (9); 1 Burn's Eccl. Law, 296. The mode in which Lord Stamford's rights were originally acquired is immaterial: *Capel* v. *Buszard* (10); *Hinde* v. *Chorlton.* (11) However acquired, the property is freehold and can be alienated in the same manner as any other freehold of the same description. The case is distinguishable from a right to a pew: *Byerley* v. *Windus* (12); *Clifford* v. *Wicks* (13); *Lousley* v. *Hayward* (14); *Mainwaring* v. *Giles.* (15)

[KELLY, C.B., referred to Co. Litt. 121 a, where it is said that a nobleman, esquire, &c., cannot claim a seat in a church by prescription as appendant or belonging to land but to a *house,* "for that such seat belongeth to the house in respect of the inhabiting thereof."]

(1) Sid. 88, 201.
(2) 1 Salk. 256.
(3) 7 B. & C. 113.
(4) 11 Rep. 23, a.
(5) 8 Taunt. 602.
(6) Cro. Jac. 366.
(7) Noy, 104.
(8) Law Rep. 1 Q. B. 1.
(9) 1 H. & N. 744.
(10) 6 Bing. 150.
(11) Law Rep. 2 C. P. 104.
(12) 5 B. & C. 1.
(13) 1 B. & A. 493.
(14) 1 Y. & J. 583.
(15) 5 B. & A. 356.

1869

CHAPMAN v. JONES.

That passage applies only to *pews* in the body of the church, which belong to parishioners as resident. It does not include the case of a chapel. In *Churton* v. *Frewen* (1), Kindersley, V.C., mentions without adverse comment the custom of founding private chapels *not* annexed to houses.

Giffard, Q.C., and *Horatio Lloyd*, in support of the rule. The evidence in this case, which is confined to acts of ownership only, is not sufficient to create a presumption that the chapel was the freehold of inheritance of Lord Stamford. No amount of user *necessarily* shews a fee simple unless the acts of ownership are irreconcileable with any other condition of things. In a church they cannot raise a presumption against the vicar and parishioners so as to bar them of their right to enter a particular chapel. At most Lord Stamford was only entitled to the exclusive occupation of the chapel as lord of the manor of Staley, and it was in that capacity, according to the inscription on the walls, that his ancestors repaired.

[KELLY, C.B. The inscription speaks of immemorial repair by the Earls of Stamford and Warrington; an important fact, the effect of which does not seem to be weakened by the circumstance that the writer thought proper to describe them as lords of the manor of Staley.]

The whole inscription must be read together. Repair, however, is a fallacious test of ownership and the right of exclusive occupation. An owner of land may have repaired a road from time immemorial and yet be unable to prevent the public from passing over it. At any rate, repair by one "as lord of a manor" cannot be evidence of a right to exclusive occupation apart from the manor. Lesser chancels which are parts of churches and pews are really on the same footing, and the observation in Co. Litt. 121 a, applies to them. In *Corvin's Case* (2) an aisle seems to be considered as necessarily incident to a house and land within the parish; and in Stephens' Laws of the Clergy, 278, it is said that an aisle is always held *with a house*. *Buxton* v. *Bateman* (3) does not touch the question whether a chapel may be granted separately, and there is no case which has settled that a chapel can be so

(1) Law Rep. 2 Eq. at p. 651.
(2) 12 Rep. 105.
(3) Sid. 88, 201.

granted. *Churton* v. *Frewen* (1) is also beside the point, for there the chancel was claimed as appendant to a manor or manor house.

1869

CHAPMAN v. JONES.

[KELLY, C.B. If the freehold of inheritance was in Lord Stamford, had he not, incidentally to his estate, the power of conveying it?]

This is not an ordinary right of seisin in the soil, but an exceptional right to exclusive user.

KELLY, C.B. This is an action of trespass, brought to try the right to a private chapel alleged by the plaintiff to be his freehold, and the only question raised by the pleadings which we are called on to decide is, whether or not the soil on which the chapel stands is the plaintiff's. Now the circumstances of the case are these:— The chapel is a portion of Mottram parish church. It is at the south side near the eastern extremity. Within it are a number of pews, and one side of it is surrounded by a part of the wall of the church itself. In the middle of the wall there is a door leading from the churchyard into the chapel, and thence into the body of the church, and in this door is a lock. The trespass complained of, and admitted, is the removal by the defendant of the lock of the door, and the passing by him through the door from the churchyard into the church. The defendant has, among other pleas, pleaded "not possessed," and on this issue arises the main question in this case, the plaintiff contending that upon the evidence he has shewn that he is entitled to the soil on which this building stands as his freehold of inheritance.

Now, first, we have to consider whether there *can be* a freehold of inheritance in a private person in a chapel constituting to the eye, and being in fact, an integral part of a parish church. Upon this point I feel no doubt. We know that there are many such chapels in various parts of the country belonging to, and attached to the residences of, persons who have landed property in the neighbourhood. These edifices are referred to as freehold property in a number of works of high authority. Thus in Johnson's Vade Mecum, Burn's Ecclesiastical Law, and in the case of *Fuller* v. *Lane* (2), and many other authorities, we find enough to shew that these chapels exist in great numbers, and are frequently treated

(1) Law Rep. 2 Eq. 634. (2) 2 Add. 419.

1869

CHAPMAN v. JONES.

as the freeholds of inheritance of families in the neighbourhood. This being so, the question is whether, from the facts of this case, we shall be justified in inferring, as we have power left to us to do, that this Stamford or Staley chapel is, or rather was, the freehold of inheritance of the Earl of Stamford and his predecessors, and is now the plaintiff's.

Now looking at the evidence, and the admissions which have been made, I am unable to conceive how such a right can ever be established if the evidence and the admissions are insufficient to establish it here. It is admitted that the church and chapel are coeval, and further, it is proved that as far back as legal memory goes the Earl of Stamford, or his predecessors, have exclusively repaired it, including its wall and door. Further, we have numerous acts of ownership established. Thus, to take one instance, it is shewn that for the purposes of attending divine service, the pews within the chapel have always been exclusively occupied either by members of the Stamford family, or by tenants or others claiming under the Earl of Stamford.

But it is contended that, assuming there can be a freehold in a private person of such property as this, it must of necessity be annexed to the enjoyment of a manor house or messuage of some sort or other. But the authorities cited during the arguments shew that there is a wide difference between *pews* in a parish church which are annexed to dwelling houses in the parish, and lesser chancels, or chapels. With regard to pews, it appears to be beyond doubt that they must be annexed to a dwelling of some kind or other. But with regar to chapels, or lesser chancels, they are on an entirely different footing. They are beyond the jurisdiction of the ordinary, and may be the freeholds of private persons. This distinction between pews and chapels is recognized in the case cited from Siderfin (1); and again in *Mainwaring* v. *Giles*. (2) In the latter case there was an action for disturbing the plaintiff in the use of a pew, and Abbott, C.J., says, at p. 361: "I am of opinion that this being a pew in the body of the church, and not in a chancel, which might be the freehold of an individual, no action at common law can be maintained for a disturbance, because the pew is not annexed to any house." Now

(1) Sid. 88, 201. (2) 5 B. & A. 356.

here we have a part of the church which may be the freehold of a private person. Other authorities (and among them is the passage from 2 Inst. 489) draw the same distinction, and there is no authority cited for the proposition that a chapel like a pew must be annexed to a dwelling house. The passage referred to in Co. Litt. 121 a, merely relates to pews in the body of a church, and even in that passage itself the above distinction is adverted to. But where a chapel is claimed as a freehold, and the claim is made out, can it be necessary that it should be only capable of being held or enjoyed along with a manor house? Upon no principle of law that I am aware of is it possible to hold that a freehold piece of land, just because a church and chapel may be built on it, can be held as appendant or appurtenant to other land. And here, moreover, we have the additional difficulty that the site of this chapel is not within the manor; and it is new to me that land outside of a manor, but included in the same parish with the manor, can be held to be necessarily appurtenant to the manor, or necessarily incidental to the inhabitancy of the manor house, and incapable of being enjoyed in any other way.

It remains to add a few words on the principal portions of the evidence by which the defendant attempted to support his contention. First, it was proved that five years before the conveyance to the plaintiff, viz., in 1853, the vicar had a new lock put on the door of the Stamford chapel. But this fact, as it was done without the knowledge of Lord Stamford, and also was in a time quite recent, cannot affect the law of the case. Then a hatchment has been produced with an inscription to the effect that the chapel had always been repaired by the Earls of Stamford and Warrington "as lords of the manor of Staley." But assuming this statement of fact to be correct, it amounts to no more than this, that the person who drew it up or dictated it may have thought, not unreasonably, that the chapel was repaired by Lord Stamford's predecessors as being the lords of the manor of Staley. Under these circumstances, and taking the evidence given in the case as a whole, I am of opinion that the plaintiff is entitled to retain his verdict, and the rule must therefore be discharged.

BRAMWELL, B., concurred.

1869

CHAPMAN v. JONES.

CHANNELL, B. I am also of opinion that this rule ought to be discharged. The first great question raised by the pleadings is whether the plaintiff made out in fact that he was owner in fee simple of the land on which the chapel called the "Stamford or Staley chapel" is built. I think that the onus lay on him to prove the fact. A stranger, on entering Mottram church, would naturally conclude that this chapel was part of the church, and it was incumbent on the plaintiff to shew that the freehold of the chapel was in him. Now the first observation that occurs on this part of the case is this: *Can* there be such a right in a private person? I think it is clear that it can exist, and it may be acquired in several ways. In the present case it is admitted that the chapel and church are coeval, and that no repairs to the chapel have ever been done by the parishioners, but all repairs by the Earls of Stamford, or their predecessors the Earls of Warrington. This being so, I should think it probable that some Earl of Warrington was the founder of the church, and that he did not grant away the soil on which the chapel was built. These cases of founding churches are analogous to those of the dedication of a highway. It is very seldom that a grant of the soil on which the church is built can be found, but acquiescence in consecration renders the case analogous to that of a dedication, and the soil afterwards is vested in the ordinary or in the rector, as trustee for the benefit of the parishioners. This amounts to a quasi dedication to them for the purpose of public worship; and there are cases to shew that where there is an acquiescence in consecration, the original owner divests himself of his property in the soil. But if on the evidence he is shewn to have kept a chapel, being part of the church, in his own hands, there is nothing illegal in that, but it is on him to make out the fact so as to be able to maintain an action of trespass.

Then, has the owner here done this? It is admitted that the church and chapel are of the same date, and it also appears that the Stamford family have always, and the parishioners never, done the repairs. A strong inference arises from this continuous repair, and the inference is strengthened by the circumstance that the body of the church has been repaired from time to time at the parishioners' expense. There is also the evidence of the tenants of Lord Stamford having sat in the chapel, and of the

seats there having been let for his benefit. Now, if the right to the freehold can exist, as I consider that it can, whether it be acquired by original reservation by the founder, by re-grant, or otherwise, the circumstances above referred to, and more particularly the fact of Lord Stamford and his predecessors having repaired from time immemorial, raise a strong presumption that they are the owners of the freehold of the soil. We have next to inquire how it is attempted to get rid of this inference or presumption. There is the fact that in 1853 the vicar made some alterations in the door in the chapel wall, and also that the sexton seems at one time to have had the custody of the key. But these are very small things to put against the inference to be derived from immemorial repair. Then in 1858 comes the conveyance to the plaintiff, who puts a new lock and key to the door, which causes the dispute leading to this action. It is needless to go into the particulars of the alleged trespass, for the lock and key must be taken to be part of the building, just as in the case of an ordinary house. There is a trespass admitted for which the plaintiff is, in my opinion, entitled to recover. I should add a word as to the hatchment and the inscription on it. It is certainly more than 100 years old, and I do not say it ought to be thrown out of consideration, but still giving it all its just weight, it is only one element in this case, and is, I think, insufficient to countervail the inference we ought to draw.

One more point remains. The plaintiff claims as grantee of Lord Stamford, but although the grantor had the freehold as owner, could he convey it? I think there is no doubt that he had the power. The land on which the chapel stands is not within the manor of Staley at all. It cannot, be appendant or appurtenant to the manor; and the owner had a good right to convey all his interest in it to another. I am therefore of opinion, upon these grounds, that the verdict for the plaintiff should stand.

Rule discharged.

Attorneys for plaintiff: *Bower & Cotton.*
Attorney for defendant: *J. E. Fox.*

1869
June 3.

COX *v.* LEE.

Libel—Charge of Ingratitude—Explanation of Grounds of Charge.

To charge a man with ingratitude is libellous; and such a charge may also be libellous, notwithstanding that the facts, upon which it is founded, are stated, and they do not support the charge.

Per Kelly, C.B.:—An untrue statement that a person was at a past time in pecuniary difficulties may be libellous, although it is also stated that these difficulties have been surmounted.

DECLARATION: 1st count, on a libel published in the *Leicester Mail* by the defendant of the plaintiff, as proprietor and publisher of the *Leicester Advertiser*, in the following words: "that the *Advertiser* should disparage Mr. Frewen is hardly accounted for by a little incident related the other night to his constituents by Mr. Frewen, except that that excellent educator of the people adds to numerous other virtues not mentioned in the litany that which all true Englishmen abominate most, ingratitude." 2nd count, on another libel published in the *Leicester Mail* by the defendant of the plaintiff in relation to his being proprietor and publisher of the *Leicester Advertiser*. The libel set out contained an account of a public meeting held at Leicester, and addressed by Mr. Frewen as candidate for the northern division of Leicestershire; at this meeting Mr. Frewen read a passage from the plaintiff's paper, the *Leicester Advertiser*, which was as follows: "After the unsuccessful attempts of Mr. Frewen, in some of which we accorded him our support, to obtain one of the seats of the northern division, we feel compelled to state our opinion, that his indiscretion in making the present attempt can have no other effect than that of disquieting the Conservative ranks, and of affording to the opposite political party an opportunity of testing their strength at the Conservative cost, and of gaining probably some additional influence in that part of the county, &c." Mr. Frewen then proceeded to say that "such a statement was most ungrateful on the part of Mr. Cox (the plaintiff) who would never have been proprietor of that journal but for the help he Mr. Frewen had given—(cries of 'shame.') He was in a great strait, and asked him (the speaker) to assist him. He would certainly say that the debt had been most honourably repaid, and he would never have mentioned it but for such

ungrateful conduct on the part of Mr. Cox." 3rd count, on another libel published in the *Loughborough Monitor* by the defendant of the plaintiff as the proprietor and publisher of the *Leicester Advertiser*. The libel set out was a paragraph containing a letter from the plaintiff's solicitor to the defendant threatening an action against him for the report in the *Leicester Mail*, which was the matter of the 2nd count, and denying the truth of the statements made by Mr. Frewen; and also a letter from Mr. Frewen to the defendant, in answer to one communicating to him the substance of that letter, in which he said: "I have read your report as to what I said on Wednesday evening last with reference to Mr. Penn Cox (the plaintiff), and though I do not think I made use of the exact expression that your reporter has attributed to me, yet the report is calculated to convey to any one (who has not got a twist in his intellect) the substance of my meaning, which was this, that when Mr. Penn Cox wanted to purchase the *Advertiser* he had not the means to pay for it, and he made more than one or two urgent applications to me for assistance; and I did assist him to the amount that he asked me to do, which money was most honourably repaid; but that I did not think Mr. Cox had shewn his gratitude to me for what I had done for him. I am not aware that there is anything libellous in saying that a man was in a great strait ten years ago, and that he had, as far as I know, met all his engagements, and paid everybody."

Pleas: 1. Not guilty. 2. Justification. Issues thereon.

The cause was tried before Pigott, B., at the Leicester spring assizes, 1869. The publication by the defendant of the libels was proved, and it appeared that the facts with respect to the alleged loan were as follows:—The plaintiff conducted the *Advertiser* in partnership from 1850 to 1857; in the latter year he bought out his partner, and on that occasion (as he swore) an offer of assistance was made to him by Mr. Frewen, but (as Mr. Frewen swore) a request for assistance was made by him to Mr. Frewen; no money however was then advanced, but in 1863 the plaintiff, requiring money to pay off a sum which he had borrowed to enable him to work the paper, did obtain a loan of 300*l.* from Mr. Frewen, which was to be paid off by instalments of 100*l.* per annum, with 5 per cent. interest; in 1865, however, the plaintiff having privately

1869

Cox v. Lee.

remonstrated with Mr. Frewen on his political conduct, and urged him to retire from the then impending election contest, Mr. Frewen required the whole of the remaining debt to be paid off at once, and this was accordingly done.

A verdict was found for the plaintiff, damages 20*l.* In Easter Term a rule was obtained to arrest the judgment, on the ground that none of the counts in the declaration disclosed any cause of action; or for a new trial on the ground that the learned judge ought to have directed the jury to find for the defendant on both issues, and also on the ground that the verdict was against the weight of the evidence, and that the damages were excessive.

May 8. *O'Malley, Q.C.*, *Keane, Q.C.*, and *Merewether*, for the plaintiff, shewed cause. The charge of ingratitude is clearly libellous: *Hoare* v. *Silverlock* (1); and its libellous character is not altered by a statement of the reasons why it is made; rather the facts stated, being themselves inaccurate, aggravated the libel; a charge much less grave than that of ingratitude is sufficient to give a right of action; and even the false statement as to the plaintiff's pecuniary necessities might so far disparage him as to be actionable: *Fray* v. *Fray*. (2)

June 3. *Bulwer, Q.C.*, and *Jacques*, for the defendant, supported the rule. Supposing the first count to be good as charging ingratitude simply, yet the second and third are bad, and the verdict being general, judgment must be arrested, or a venire de novo awarded. (3)

As regards the second and third counts, the questions are, whether, in either count, the statement of facts, independently of the conclusion drawn from them by Mr. Frewen, is libellous; and whether those facts support his conclusion? As to the first question, it cannot be said that a statement, in effect, that, when the plaintiff wanted to purchase the paper, Mr. Frewen lent him money which the plaintiff had honourably repaid, but that the plaintiff, notwithstanding, declined any longer to support Mr. Frewen, was, to use the language of Parke, B., defining a libel, in *Parmiter* v. *Coupland* (4),

(1) 12 Q. B. 624.

(2) 17 C. B. (N.S.) 603; 34 L. J. (C. P.) 45.

(3) See *Ayrey* v. *Fearnsides*, 4 M. & W. 168; *Lewin* v. *Edwards*, 9 M. & W. 720.

(4) 6 M. & W. at p. 108.

"calculated to injure the plaintiff's reputation by exposing him to hatred, contempt, or ridicule;" on the contrary, such a statement was calculated rather to raise the character of the plaintiff. As to the second question, the libels complained of do not, as was the case in *Hoare* v. *Silverlock* (1), charge the plaintiff with ingratitude simply, but only with conduct which, in Mr. Frewen's opinion, was ungrateful; and if his opinion upon the facts stated was unfounded, there is no libel, but if his opinion was well founded, then the plea of justification was proved.

The most that can be said in support of the second and third counts is, that Mr. Frewen imputes ingratitude, while at the same time he shews that the imputation is unfounded; for it was not ingratitude in the plaintiff to disregard private friendship in the discharge of his public duty; and there is no suggestion that his opposition to Mr. Frewen was prompted by any sinister motive. The case of *Fray* v. *Fray* (2) is altogether different from the present; and the proposition in support of which that case was cited, viz., "that the publication of that which can, by any construction, lower the estimation of the plaintiff's character, the plaintiff has a right to have left as a question to the jury," is too broad; for it would seem to imply that in no case can the question of libel or no libel be determined by the Court. But that is not so. For instance, to write of an attorney that he is "an honest lawyer" (*Boydell* v *Jones*) (3), may or may not be libellous; but a declaration which failed to shew by proper averments that the words were used in a sense other than the natural and obvious sense, would be bad both on demurrer and after verdict. Unless the libels alleged in the second and third counts consist in the imputation of ingratitude, the plea of justification was proved, because the facts upon which the imputation was founded were stated with substantial accuracy. If the libels relied on are the charges of ingratitude, then, for the reasons already given, those charges were not, under the circumstances, libellous; or, if they were, the truth of them was proved.

KELLY, C.B. The verdict being for general damages not apportioned to the several counts, if any one bad count is joined

(1) 12 Q. B. 624.

(2) 17 C. B. (N.S.) 603; 34 L. J. (C.P.) 45.

(3) 4 M. & W. 446.

1869

Cox v. Lee.

with the others the verdict cannot stand. We are, therefore, called on to determine, not whether a libel was in fact published, but whether what the plaintiff has published has been so stated that it was competent to the jury to find a verdict and give damages upon that statement. The allegation in the counts most questioned is, that when the plaintiff wanted to purchase a newspaper he had no money to buy it with, and made one or more urgent applications to Mr. Frewen for a loan, which had since been honourably repaid. It is impossible to consider the question raised on this statement fairly without putting oneself in the position of the plaintiff, and seeing whether it would not be painful to his feelings to have such statements made at a public meeting, in the county where he resides and publishes his newspaper, by a gentleman of considerable standing and position in that county. Without reference to the bearing of that statement on the charge of ingratitude, and the question whether it would or would not lead those who heard it to the inference that a person so acting as was described was guilty of ingratitude, to say of a man, prosperous and in independent circumstances, that when he wanted to purchase the property he now owns he had not money to pay for it, and made urgent application for a loan to another person, does in itself convey a reflection on the person thus spoken of, not only likely to be painful to his feelings, but also likely to impair his credit and reputation in the county. A charge pointing to anything like inability in respect of pecuniary resources would, to persons reading such a statement in a public newspaper, tend to injure his position in the world. [After referring to the question of damages, which he held not excessive, the learned judge proceeded]:—We are further called upon, on the facts actually proved, to determine, not only whether the publication could or could not be libellous, but to say that it was of such a nature that the question ought not to have been left to the jury. But it is only when the judge is satisfied that the publication cannot be a libel, and that, if it is found by the jury to be such, their verdict will be set aside, that he is justified in withdrawing the question from their cognizance. Here, on the contrary, I am of opinion that the learned judge was fully justified in leaving the question to them, and that their finding is according to the evidence.

10 QB 561

1869

Cox v. Lee.

BRAMWELL, B. I also think this rule must be discharged. The libels complained of charge the plaintiff with ingratitude; for though facts are added, yet the obvious meaning of the statements is to make this accusation. It is clear that if ingratitude is charged generally, without any reason being given, it is libellous; and the validity of the first count is not questioned. But with respect to the other two it is said that they disclose no cause of action, because Mr. Frewen shews what it is that he calls ingratitude, and thereby shews that it is not such in fact. But though it is true that he states some reasons which induce him to come to the conclusion that the plaintiff was ungrateful, there still remains the charge of ingratitude, and any one hearing it might well say: "The facts stated no doubt existed, but inasmuch as they do not shew any ingratitude, that charge must be made because of something else not mentioned."

But, further, I think that the libels not only contain a charge of ingratitude, but also shew its existence, supposing the facts truly stated. For, though it is easy to say that it is the duty of a patriot, if he sees an unfit man aiming at the possession of a public post, to say he is unfit, this is, like gratitude itself, a duty of imperfect obligation, and not such as would necessarily relieve him in its performance from the charge of ingratitude. Suppose that, having applied with great urgency to Mr. Frewen to lend him money, Mr. Frewen had done so, and then, without any further circumstances, the plaintiff had withdrawn his support from Mr. Frewen, and said that he was not a proper person to stand for the county, would it not have been ungrateful? I think it would. But supposing it was his duty to point out Mr. Frewen's unfitness, it might have been done in another way than that adopted, which casts ridicule upon his candidature and charges him with indiscretion. I think that it would have been ungrateful in the plaintiff to write thus of one to whom he was under the obligation I have supposed; the defendant's argument therefore fails, even on this ground, for the libel stated in the declaration not only charges ingratitude, but shews that it exists.

Then, it is argued by Mr. Bulwer, that in that case the libel is, at any rate, justified, because the statement it makes is true. But this is not so; and, on the contrary, if the true facts had been

1869

Cox v. Lee.

stated, they would have shewn that there was no ingratitude at all, for it appears that, on the plaintiff telling Mr. Frewen that he would no longer support him, Mr. Frewen required the repayment of the money, and thereupon the money was, in fact, repaid. Now, I think that cancelled the former obligation, and left the plaintiff at liberty to write as he did. If these facts had been stated, the case would have gone a long way to raise the point insisted on by Mr. Bulwer, for then, at the same time with the charge of ingratitude it would have been shewn that there was nothing ungrateful in the plaintiff's conduct; the added circumstances would have qualified the charge of ingratitude, not in the sense of making it justifiable, but in the sense of diminishing the probability of its injurious effect.

Therefore the defendant's case fails: first, on the ground that a charge of a moral offence is made, and assuming that the circumstances stated in support of it do not warrant the opinion founded on them, it does not cease to be a libel, for it raises a doubt whether there are not some other facts which would justify the charge; and, secondly, because if no further facts existed than were stated, a case of ingratitude was shewn; and, though the facts might be true, so far as they were stated, other facts were not stated, which existed and which would have shewn that the plaintiff was not open to the charge of ingratitude.

I may say that these observations are directed partly to that portion of the rule which seeks to arrest the judgment, and partly to that portion which asks for a new trial.

Clearly ~~Channell~~, B. I am of the same opinion. A judge would do wrong if, in an action for libel, he told the jury distinctly that the plaintiff had a cause of action, or if he told them distinctly that the plaintiff had not a cause of action. In *Parmiter* v. *Coupland* (1) Parke, B., after referring to Mr. Fox's Act (2), by which, as he observes, indictments for libel were put upon the same footing as other criminal charges, says (3), "It has been the course for a long time for a judge, in cases of libel, as in other cases of a criminal nature, first, to give a legal definition of the offence, and then to

(1) 6 M. & W. 105. (2) 32 Geo. 3, c. 60, s. 2.
(3) 6 M. & W. at p. 107.

leave it to the jury to say whether the facts necessary to constitute that offence are proved to their satisfaction; and that, whether the libel is the subject of a criminal prosecution or civil action." My Brother Pigott has, therefore, given the proper direction to the jury; and certainly when, at a public meeting, words are used which are repeated in a public newspaper, and which charge the defendant with ingratitude, that sufficiently raises a question for the jury, whether they were not made use of under such circumstances, and in such a manner, as to make them libellous. There can be no doubt that the charge is in itself as opprobrious as any that can be made. Therefore, although you couple it with other matters, which tend to explain the charge, it is still a question for the jury whether the language was made use of in such a mode and under such circumstances as to justify a verdict for the plaintiff.

PIGOTT, B. At the trial I exactly followed the rule laid down by Parke, B., in the passage cited by my Brother ~~Channell~~, defining to the jury what in law amounted to a libel, and leaving the question of libel or no libel to them. My Brother Bramwell has clearly pointed out that the charge was made not in such a manner as to disprove it, but rather to add to it force and point; and much must always depend upon the attendant circumstances. As to the charge of ingratitude being in itself calculated to bring into contempt and disrepute, no one can deny it who considers in what light it is regarded by poets and moralists, who are the mirrors and exponents of the universal feelings and judgment of mankind. I think, if I committed any error, it was an error rather in favour of the defendant.

Rule discharged.

Attorneys for plaintiff: *De Gex & Harding, for Freer & Reeve, Leicester.*

Attorneys for defendant: *Dale & Stretton, for C. & A. Stretton, Leicester.*

WINN *v.* MOSSMAN.

1869
June 7.

Borough Justices—Application of Penalties—Separate Commission of the Peace—Construction of Statute—Preamble restraining Enactment—11 & 12 *Vict. c.* 43, *s* 31—9 *Geo.* 4, *c.* 61, *s.* 26—24 & 25 *Vict. c.* 75, *s.* 4.

Where justices of a borough, which has a separate commission of the peace, but not a separate court of quarter sessions, in the exercise of their summary jurisdiction, impose penalties for offences against the general law, they act for the county, and the penalties must, under 11 & 12 Vict. c. 43, s. 31, be paid over by their clerk to the treasurer of the county or place to the quarter sessions of which the appeal from their decision lies; and it makes no difference that the borough has a separate commission of the peace.

The 4th section of 24 & 25 Vict. c. 75, which declares that in the Alehouse Licensing Act (9 Geo. 4, c. 61) the words "county or place" include any borough having a separate commission of the peace, though not a separate court of quarter sessions, only applies to the power of granting and withdrawing licences contained in that act, and does not affect the application of penalties fixed by its 26th section.

SPECIAL CASE stated in an action brought by the treasurer of the West Riding of Yorkshire against the clerk to the justices of the peace for the borough of Bradford, to recover certain fines and penalties imposed by the justices acting summarily in respect of offences against the general law, and not under local statutes, and received by the defendant under 11 & 12 Vict. c. 43, s. 31, and 9 Geo. 4, c. 61, s. 26.

In the year 1847, the parliamentary borough of Bradford was constituted a municipal borough by royal charter, which extended to the inhabitants of the borough all the provisions of 5 & 6 Wm. 4, c. 76, and of any other acts amending or altering or relating to that act.

The borough has a separate commission of the peace under 5 & 6 Wm. 4, c. 76, s. 98, which was granted on the 6th of July, 1848, but has no separate court of quarter sessions. It has a borough fund and a borough treasurer. It supports its own police by means of rates upon the inhabitants, and expends annually a considerable sum in the prevention, detection, and punishment of crime. It maintains the borough court, and pays the salaries of the clerks and officers. It also bears the expense of those prosecutions for

which no allowance is made by the county, and in addition pays a contribution of more than 6000*l.* per annum towards the county rates.

The moneys, the subject of this case, would, if received by the treasurer of the borough, be applied by him towards these expenses.

The justices of the peace for the West Riding are empowered, by 5 & 6 Wm. 4, c. 76, s. 111, to exercise the jurisdiction of justices of the peace in and for the borough, as fully as by law they may do in and for the county; but by 12 & 13 Vict. c. 18, s. 1, every sitting and acting of the borough justices at the court appointed for the purpose is to be deemed a petty sessions of the peace, and the district for which the same is holden is to be deemed a petty sessional division within the meaning of any act of parliament then or thereafter to be made.

In all summary proceedings before the borough court there is an allegation that the parties live, or the offence or cause of complaint arose, within the borough; the trial or hearing always takes place within the petty sessional division, namely, the borough; and whenever the West Riding justices assist in these cases, they are described in the summonses and process as justices acting in and for the borough.

The county petty sessional division within which Bradford is situated is that of East Morley; and county special sessions are held within the borough for various purposes which do not directly affect the borough, namely, for highways, passing accounts, &c. The county business and the borough business are to that extent kept quite distinct and separate.

By 11 & 12 Vict. c. 43, s. 31, penalties and sums paid under warrants of distress, or convictions, or orders of justices, are to be paid over by the constables, &c., receiving them, to the "clerk of the division in which the justice or justices issuing such warrant shall usually act;" and all sums so received by the clerk shall forthwith be paid by him as directed by the statute on which the information or complaint is framed; and, if the statute contain no such directions, then "to the treasurer of the county, riding, division, liberty, city, borough, or place for which such justice or justices shall have acted; . . . and every

1869

WINN v. MOSSMAN.

such clerk is to keep an account of all such moneys received by him, and to render a copy to the justices assembled at the first petty sessions of every month held for the division in which such justice or justices as aforesaid shall usually act, and to deliver every such return "to the clerk of the peace for the county, riding, division, liberty, city, borough, or place within which such division shall be situate, at such times as the court of quarter sessions for the same shall order in that behalf."

By the Alehouse Licensing Act (9 Geo. 4, c. 61), s. 26, any justice, before whom any penalty is recovered under the provisions of the act, may award any portion not exceeding one half to the prosecutor, "and the remainder to the treasurer of the county or place for which such justice shall then act."

24 & 25 Vict. c. 75, entitled "The Municipal Corporations Act Amendment Act, 1861," by s. 4, after reciting that doubts have arisen whether boroughs with separate commissions of the peace, under s. 98 of the principal act, but without separate quarter sessions, are towns corporate within 9 Geo. 4, c. 61, so as to give the justices of such borough control over the granting or withdrawing licences, declares, that in the construction of the last-mentioned act, "the words 'town corporate,' and the words 'county or place,' and the words 'division or place,' include every borough in England having a separate commission of the peace, although it may not have a separate court of quarter sessions."

Under 11 & 12 Vict. c. 43, s. 31, sums amounting to 25*l.* had been paid over by the borough constables to the defendant, which he refused to pay over to the plaintiff, alleging that it was his duty to pay them over to the borough treasurer.

Under 9 Geo. 4, c. 61, penalties had been imposed by the borough justices and received by the defendant, the amount of which, after deducting the portion awarded to prosecutors, was 20*l.*, and this sum also the defendant refused to pay over to the plaintiff, on the ground that 24 & 25 Vict. c. 75, s. 4, made these penalties also payable to the borough treasurer.

Hannay (*Lascelles* with him), for the plaintiff. First, the word "borough" in Jervis's Act (11 & 12 Vict. c. 43), s. 31, means a borough for which a separate court of quarter sessions is held.

The case of *Mayor of Reigate* v. *Hart* (1) is decisive on this point, and differs from the present only in the fact that the borough of Reigate had no separate commission of the peace, the mayor and ex-mayor being the only justices of the borough under 5 & 6 Wm. 4, c. 76, s. 57. But the judgment of the Court proceeded upon grounds quite independent of this circumstance, and *Reg.* v. *Dale* (2) also shews that no distinction can be drawn between the cases on this ground. The main ground of the decision in both these cases was that it would be unjust if the penalties of good convictions were to go into the borough fund, whilst the costs of the convictions which could not be sustained were borne by the county. If the plaintiff is right, there is no injustice, for the county rates which bear the burden will also reap the benefit, and the borough of Bradford which contributes to the county rates is also interested in every addition to them.

But further, s. 31 was intended to secure not only that penalties should be paid to the proper parties, but also that they should be regularly accounted for. But there is no clerk of the peace for the borough to whom the accounts can be sent; they must therefore under that section be sent to the clerk of the peace for the West Riding, who, if the defendant's contention is correct, has no interest in the matter. The money would go to the borough, and the account of the money to the Riding. On the other hand, the plaintiff's construction satisfies every word of the section, for by 12 & 13 Vict. c. 18, s. 1, Bradford is a petty sessional division; the defendant is clerk of that petty sessional division; he will send a copy of the return to the justices of the borough, and will send the return itself to the clerk of the peace for the Riding. That justices of a borough, which has no quarter sessions, acting in the exercise of their summary jurisdiction within the borough in respect of offences against the general law, act for the county, is shewn by *Rex* v. *Amos* (3), and also by reference to many sections of 11 & 12 Vict. c. 43. If in the course of the hearing of an information a recognizance becomes forfeited and has to be estreated, it must be sent to the clerk of the peace for the county for that purpose, ss. 9, 13, 16, 20; when the defendant is adjudged to be imprisoned he must

(1) Law Rep. 3 Q. B. 244. (2) Dears. C. C. 37; 22 L. J. (M.C.) 44.
(3) 2 B. & A. 533.

1869

WINN v. MOSSMAN.

be sent to the house of correction or common gaol, ss. 19, 21, 22, 24; and when the conviction is drawn up it must be lodged with the clerk of the peace of the county among the other county records, s. 14.

Secondly, as to the penalties imposed under 9 Geo. 4, c. 61, s. 26, the case of *Reg.* v. *Dale* (1) is conclusive in the plaintiff's favour, unless 24 & 25 Vict. c. 75, s. 4, has altered the law. That section was introduced into the act in consequence of the conflicting decisions in *Brown* v. *Nicholson* (2), and *Candlish* v. *Simpson* (3); and was not intended to touch the question of the application of penalties. If the legislature had had any such object in view, one would expect to find an express clause for the purpose dealing with penalties generally, especially since the act is an act to amend the Municipal Corporation Act of 5 & 6 Wm. 4, c. 76; and that act, which dealt both with boroughs having quarter sessions, and also with boroughs having separate commissions of the peace, but no quarter sessions, only gave to the former class of boroughs, to the credit of the borough fund, penalties recoverable on summary convictions, s. 126. The preamble to s. 4 shews that the mischief to be remedied was the doubt as to what justices were competent to grant or withdraw alehouse licences, but this is a matter altogether distinct from the question of the application of penalties. If the defendant's view were to prevail, this declaratory act, passed to remedy an inconvenience, would work an injustice. Again, there are many sections in the Alehouse Licensing Act where the words "county or place" cannot be construed so as to include boroughs which have separate commissions of the peace, but no separate court of quarter sessions; s. 25 speaks of the House of Correction of the "county or place;" s. 27 gives an appeal to the quarter sessions of the "county or place:" see also ss. 28, 29, and 33. Lastly, 24 & 25 Vict. c. 75, has in no way affected the definition of the words "treasurer of the county or place" given by the 37th section of the Alehouse Licensing Act, which interprets them to mean "any officer acting in such capacity or charged with the receipt and expenditure of moneys from and out of which the costs of public

(1) Dears. C. C. 37; 22 L. J. (M.C.) 44.
(2) 28 L. J. (M.C.) 49.
(3) 1 B. & S. 357; 30 L. J. (M.C.) 178.

prosecutions have been usually defrayed." There is no officer answering to this description in such a borough as Bradford: see *Reg.* v. *Dale.* (1)

Manisty, Q.C. (*Kemplay* with him), for the defendant. First, as to the construction of that portion of 11 & 12 Vict. c. 43, s. 31, which directs the ultimate payment of the penalties, its meaning is fixed by what follows with respect to the accounts. The accounts are to be sent to the justices "assembled at the petty sessions for the division in which such justices as aforesaid (that is, the convicting justices) usually act." Now it is admitted that the return must be made to the borough justices, for it is certain that Bradford is the petty sessional division for which they act; but if that is so, then the treasurer of the borough or place for which they act is the treasurer of Bradford, and the penalties must be paid over to him. This would be otherwise if there were no separate commission of the peace, for there would then be no treasurer; but where there is such an officer all the words of the section are satisfied. The construction is confirmed by the change of phraseology at the end of the section, which speaks no longer of the place for which the justices act, but of the "county, &c., within which such division *shall be situate.*" Nor is the direction for rendering accounts to the quarter sessions absurd, for that body imposes the county rate upon the borough and fixes its quota of contribution, and it has besides an interest in the information as a matter of police.

Secondly, the words of 24 & 25 Vict. c. 75, s. 4, are too strong and express to be got over; the preamble cannot overrule them, for its only function is to explain words of doubtful construction, not to qualify what is certain.

Hannay was not called upon to reply.

KELLY, C.B. We are entirely satisfied, by the very able argument of Mr. Hannay, that the plaintiff is entitled to our judgment. The question is, whether certain penalties are to be paid to the treasurer of the West Riding of Yorkshire, or to the clerk to the justices for the borough of Bradford. The first point we have to decide turns on s. 31 of 11 & 12 Vict. c. 43; and, on the ground that

(1) Dears. C. C. 37; 22 L. J. (M.C.) 44.

1869

WINN v. MOSSMAN.

the town of Bradford is a municipal borough, with a separate commission of the peace, though without a separate court of quarter sessions, it is contended that when the borough justices act within the borough, the "place for which they act is the borough, and not the Riding," and that the penalties are therefore payable to the treasurer of the borough, and not to the treasurer of the Riding. Now, in the first place, we have a decision: *Rex* v. *Ames* (1), that when borough justices act in matters of general law cognizable by county justices, they act as county justices and not as borough justices. In harmony with this decision we have the case of *Mayor of Reigate* v. *Hart* (2), where, under this very section, the same rule was adhered to, and it was determined that the penalties must therefore be paid to the treasurer of the county. The matter is succinctly and decisively put by Lush, J., who says (3): "In such a case [that is, where the offences for which penalties are imposed are offences against the general law, and not under local statutes], *Rex* v. *Ames* (1) decides that the justices are acting as county justices, though acting in the borough. If this be so, it seems to me that s. 31 is free from doubt; it says the clerk shall pay the penalty to the treasurer of the county, riding, division, liberty, city, borough, or place 'for which such justice or justices shall have acted.' The justices here have acted for the county, not for the borough."

It appears, however, that there was there no separate commission of the peace; here there is, and it is said this makes a difference. Let us then now turn to the case of *Reg.* v. *Dale* (4), where there was a separate commission of the peace. This case is cited as an authority upon the second branch of the argument, but it is also decisive upon the first question, since it turned upon words in the Alehouse Act (9 Geo. 4, c. 61, s. 26), similar to those of the section now in question. There, in delivering the judgment of the Court, Jervis, C.J., says (5): "The prosecutor asserts that the word 'place,' as used in that section (9 Geo. 4, c. 61, s. 26), means a place for which a court of quarter sessions is held. This, we think, is the right construction. In many of the sections in which the words

(1) 2 B. & A. 533.
(2) Law Rep. 3 Q. B. 244.
(3) At p. 250.
(4) Dears. C. C. 37; 22 L. J. (M.C.) 44.
(5) Dears. C. C. at p. 50; 22 L. J. (M.C.) at p. 47.

'county or place' are used, it is manifest that the latter word applies only to cases where quarter sessions are held." The learned judge then refers to ss. 27 and 33, and proceeds: "The interpretation clause shews further, that it was intended that those penalties should be applied towards the costs of public prosecutions, and not to a borough fund, because it explains the words treasurer of a 'county or place' to mean an officer acting in such capacity, or charged with the receipt and expenditure of moneys from and out of which the costs of public prosecutions have been usually defrayed. The person to receive the penalty is to be an officer acting in the capacity of treasurer of moneys from and out of which the costs of public prosecutions have been usually defrayed." He then refers to s. 29, by which the justices in quarter sessions are authorized to indemnify justices from their costs of appeal out of the county rate, and concludes: "It would be strange that the same word should give to one fund, the borough fund, all the penalties for good convictions, and charge upon another fund, the county rate, all the costs for convictions which could not be sustained."

Now these two cases, taken together, would be conclusive upon both branches of the argument, but for the later act of 24 & 25 Vict. c. 75, s. 4, which makes the words "county or place," in the Alehouse Act, include every borough having a separate commission of the peace, although it may not have a separate court of quarter sessions, and therefore (it is contended) gives to such borough the penalties recovered under that act. But that section was enacted, as is stated in the preamble, to meet certain doubts which had arisen on the construction of the Alehouse Act (9 Geo. 4, c. 61), whether borough justices in boroughs having, under the 98th section of the Municipal Corporations Act (5 & 6 Wm. 4, c. 76), separate commissions of the peace, but not separate courts of quarter sessions, had, under the former act, the power of granting and withdrawing alehouse licences. There had been a conflict of decisions on this point, and the recital clearly points to this conflict as the matter with which the legislature were dealing, and to the solution of this difficulty as the sole object which they had in view. The section then proceeds to enact, or rather to declare, that, "in the construction of the last-mentioned act (i.e., 9 Geo. 4, c. 61), the words 'town corporate,' and the words 'county or place,' and the words 'division

1869

WINN v. MOSSMAN.

or place,' include every borough in England having a separate commission of the peace, although it may not have a separate court of quarter sessions." These words are no doubt large enough by themselves to cover the contention of the defendant, and give the penalties levied under the act to the treasurer of the borough of Bradford; but when we see, from the preamble or recital, that the single object of the section was to provide for the one special case of granting licences, the effect of the preamble is to control the enacting part of the section, and limit it to providing a remedy for the difficulty, by conferring on borough justices, in the cases referred to, the power to license. Looking, therefore, to the cases, and to the intention of s. 4 of 24 & 25 Vict. c. 75, it is clear that both under the act of 9 Geo. 4, and under 11 & 12 Vict. c. 43, s. 31, the borough justices are acting as county justices, though acting within the borough, and the penalties must be paid over to the treasurer of the place for which they act, and by which the machinery is provided for the trial of such cases when carried by appeal to the court of quarter sessions.

BRAMWELL, B. I am of the same opinion. The case of *Mayor of Reigate* v. *Hart* (1) is directly in point, and no attempt has been made to distinguish it except by the argument that there was there no separate commission of the peace; but the Court did not decide that case on any such ground, and to give our assent to the defendant's argument would be to fly in the face of that decision. Blackburn, J., says (2), "I think we must read the latter words, liberty, city, borough or place, as ejusdem generis with county, riding, division, and as being places having quarter sessions;" and Lush, J., says (3), "Now there is no court of quarter sessions for the borough of Reigate, but only for the county, and if the clerk of the justices receiving a penalty is to pay it over to the treasurer of the county, and render the return to the clerk of the peace of the county, that construction makes the section harmonious, and the provision is fair and reasonable; for if the culprit had gone to prison he would have been maintained by the county, and the borough is part of the county for these purposes; but if the penalty

(1) Law Rep. 3 Q. B. 244. (2) Law Rep. 3 Q. B. at p. 249.
(3) Law Rep. 3 Q. B. at p. 250.

is to be paid into the borough fund it would be unfair, as then the borough would receive a benefit without participating in the burden." It is quite clear therefore that the case was decided on the ground that the borough had no court of quarter sessions, and without any reference to the fact of its having or not having a separate commission of the peace.

As to the other question the matter is as clearly decided by the case of *Reg.* v. *Dale* (1), unless we are to hold that that case is overruled by 24 & 25 Vict. c. 75, s. 4, which would be to hold that this section, which is declaratory, operates upon the earlier act of 9 Geo. 4, c. 61, so as to make it mean and refer to a person and officer not existing at the time when it was passed, but only subsequently established by the Municipal Corporation Act of the following reign. The case then is clearly in point, and is undistinguishable, and, not being affected by the subsequent act of the Queen, decides this case in favour of the plaintiff.

CHANNELL, B. I am of the same opinion. The *Mayor of Reigate* v. *Hart* (2) is an express authority for the plaintiff, unless it is distinguishable on the ground that there was there no separate commission of the peace; but the case was not decided on that ground, but on a ground equally applicable to the present state of facts. As to 24 & 25 Vict. c. 75, s. 4, the enacting words may perhaps, taken by themselves, go beyond the preamble, but their effect may be narrowed on the ground stated by my Brother Bramwell. In each case, the effect is that the penalties are payable to the treasurer of that county or place to whose court of quarter sessions the appeal against the convictions is given.

CLEASBY, B. I am of the same opinion. I do not deny that the matter is one of some doubt and difficulty, so far as concerns the construction of s. 31 of 11 & 12 Vict. c. 43; but here, as elsewhere in matters of doubtful construction of statutes, the doubts and difficulties are only to be solved by authority. As soon as we have an authority, the doubt and the difficulty vanish; but if we are to reject this plain method, and, as often as it is suggested that there may be a difficulty, we are to discuss the whole matter

(1) Dears. C. C. 37; 22 L. J. (M.C.) 44. (2) Law Rep. 3 Q. B. 244.

1869

WINN v. MOSSMAN.

anew, there can be no end to the controversy. Now, here we have authorities which apply to the whole matter before us. It is suggested that a distinction is to be drawn because there is here a separate commission of the peace; but that circumstance makes no real difference. If we look at the conclusion of s. 31 it is clear the object was that the amount of penalties should be sent to those who are interested in their collection; the treasurer of the county having an interest in knowing what penalties are to be received by him, is entitled to have a return of them. This is the rational construction; but Mr. Manisty says that the section has a different object, and is intended merely to make a record for general police purposes of the amount of penalties recovered. But the object plainly pointed at by the section is that which I have mentioned. The account is to be sent first, monthly, to the petty sessions of the division in which the justices usually act, and then to the clerk of the peace for the place to which the petty sessional division belongs, at such times as the court of quarter sessions for that place shall fix. It follows therefore that if the borough has no court of quarter sessions, there is no provision at all for the sending to them of any account, except so far as they may be a petty sessional division of some county or place having a court of quarter sessions. It is obvious, therefore, that they are not intended to receive the penalties, but that they must be paid to the treasurer of the county or place to which the petty sessional division belongs; such county or place being, according to the decisions referred to, the place for which the justices have acted.

Judgment for the plaintiff.

Attorneys for plaintiff: *Bodham, for Marsden, Wakefield.*

Attorneys for defendant: *McLeod & Cann, for McGowen, Bradford.*

WHEELER AND OTHERS *v.* THE METROPOLITAN BOARD OF WORKS.

1869
June 22.

Lands Clauses Act, 1845 (8 *Vict. c.* 18), *s.* 133—*Poor-rate*—"*Promoters*."

The Metropolitan Board of Works are "promoters" within s. 133 of the Lands Clauses Act, 1845, and may be liable to an action in respect of any deficiency in the poor-rate caused during the construction of their works by their acquisition of rateable land in a parish.

Semble, persons intrusted with the construction of public works under acts which incorporate the Lands Clauses Act, 1845, are, in the absence of special circumstances, "promoters" within s. 133 of that Act.

S. 133 applies, if it appears that the works, when constructed, may, in part or in whole, be the subject of beneficial occupation.

Quære, whether it would apply in a case where it appeared that the works, when completed, could not be the subject of beneficial occupation?

SPECIAL CASE stated in an action brought by the plaintiffs, churchwardens and overseers of St. Ann's, Blackfriars, to recover from the defendants, under 8 Vict. c. 18, s. 133, the sum of 65*l.*, being the amount of the deficiency in the assessments for the poor-rates of the parish, caused by the defendants having taken lands in the parish for works authorized by their special act.

The defendants, constituted by 18 & 19 Vict. c. 120, s. 43, were by 26 & 27 Vict. c. 45, empowered to make a new street between Blackfriars Bridge and the Mansion House. Under this act they had acquired the lands in question, which, when taken, were liable to assessment, with houses standing on them, which the defendants had pulled down for the purpose of forming the street. They derived no profit from the land, and had no occupation except under and for the purposes of the act.

By 26 & 27 Vict. c. 45, s. 9, it was provided that the defendants might make under the new street a subway, which should be deemed part of the works authorized by the act, and belong to, and be vested in, the defendants; and that the defendants might permit the use of the subway for gas-pipes, &c., "on such terms and conditions, and for such period," as might be agreed on, and that they might "sell, convey, or demise any right to any company or person for any of the purposes aforesaid."

By s. 11, on the completion of the new street, all ground laid

1869

WHEELER v. METROPOLITAN BOARD OF WORKS.

open into it was to be deemed part of it, and used by the public accordingly, and the new street was thenceforth to be under the care of the Commissioners of Sewers.

By s. 12, the Lands Clauses Act, 1845 (8 Vict. c. 18), except ss. 34 to 92, and the Amendment Act, 1860 (23 & 24 Vict. c. 106), and (by ss. 13 and 20), the Embankment Act, 1862 (25 & 26 Vict. c. 93), ss. 23, 24, 40, and ss. 32 to 38, were incorporated.

By s. 22 the defendants were empowered to borrow money for the purpose of the undertaking on the security of the Thames Embankment and Metropolis Improvement Fund, and by s. 23 that fund was to be applied—first, in paying charges created previous to the act; secondly, in paying charges created under the act; thirdly, in paying expenses from time to time incurred in respect of the Embankment Act, 1862, and this act; and, lastly, in the improvement of the metropolis as Parliament might determine.

By the Lands Clauses Act (8 Vict. c. 18), s. 133: "If the promoters of the undertaking become possessed, by virtue of this or the special act . . . . of any lands charged with the land tax, or liable to be assessed to the poor's rate, they shall from time to time, until the works shall be completed, and assessed to such land tax or poor's rate, be liable to make good the deficiency in the several assessments for land tax and poor's rate by reason of such lands having been taken or used for the purposes of the works . . . nevertheless, if at any time the promoters of the undertaking think fit to redeem such land tax, they may do so in accordance with the powers in that behalf given by the acts for the redemption of the land tax."

By the interpretation clause of 8 Vict. c. 18, s. 2, the expression "promoters of the undertaking" means "the parties, whether company, undertakers, commissioners, trustees, corporation, or private persons, by the special act empowered to execute such works or undertaking."

By 18 & 19 Vict. c. 120, s. 151, the Lands Clauses Act is incorporated, except ss. 136 to 149; and for the purposes of the act, the expression "the promoters of the undertaking," wherever used in the Lands Clauses Act, shall mean "the Metropolitan Board, or the district board or vestry, acting under the provision of the said act and this act, as the case may be."

Prentice, Q.C. (*Mortimer* with him), for the plaintiffs, after referring to the sections above set out, cited *Mayor of London* v. *St. Ann's, Holborn* (1), as decisive of the point.

THE COURT then called on

Raymond, for the defendants. *Mayor of London* v. *St. Ann's, Holborn* (1), decided only that the defendants there were not rateable under s. 133, which was clear; but it was unnecessary for the decision of that point to say that they were liable to an action. The point, therefore, is still open, and on several grounds it may be contended that in the present case there is no such liability. First: The term "promoters" more naturally refers to persons engaged in a speculative undertaking, from which profit is anticipated, than to a public body who have no private interest in the work, and will derive no remuneration from it. Secondly: The works undertaken by the defendants are such as can never yield a profit, or be the subject of beneficial occupation. This is shewn by 26 & 27 Vict. c. 45, s. 11, and also by s. 21, which puts superfluous land adjoining any public street at the disposal of the Commissioners of Sewers, should they require it for the purpose of widening such street. The result, therefore, of holding the defendants liable now will be to subject them to a perpetual liability, since the deficiency is to be made good till the works are "completed and assessed," which these works never can be. This would be absurd, for the intention of the act plainly is only to provide for the period whilst the works are in progress, and to leave the matter afterwards to the operation of the general law.

[BRAMWELL, B. Have the defendants, in fact, taken any lands which will not form part of the street which is to be made?]

It must be admitted that they have taken more than will be needed for the street, but what is superfluous may be required by the Commissioners of Sewers. The cases of *Galloway* v. *Mayor of London* (2), per Lord Cranworth, C. (3), and *North London Railway Company* v. *Metropolitan Board of Works* (4), shew that public

(1) Law Rep. 2 C. P. 574.
(2) Law Rep. 1 H. L. 34.
(3) Law Rep. 1 H. L. at pp. 45, 48.
(4) John. 405; 28 L. J. (Ch.) 909, at p. 910.

1869

WHEELER v. METROPOLITAN BOARD OF WORKS.

bodies undertaking a public work are not regarded in the same light as private speculators constructing works for profit. Thirdly: It may be doubted whether the defendants have any funds applicable to the payment of this demand, since they have only power to raise money for the purpose of their undertaking: 26 & 27 Vict. c. 45, ss. 22, 23.

Prentice, Q.C., was not called on to reply.

BRAMWELL, B. After the very able argument of Mr. Raymond, it is impossible to say that there was not a question here fit for discussion. But our judgment must be for the plaintiffs, for, first, although what was said on this point in *Mayor of London* v. *St. Andrew's, Holborn* (1), was said obiter, yet the expressed opinion of three learned judges is in point against the defendants, and this ought almost to be sufficient authority for us. But, independently of that authority, we must have come to the same conclusion. The 133rd section of the Lands Clauses Act (8 Vict. c. 18), is the governing section; and, but for one difficulty, which I will afterwards refer to, it would be clear that the defendants are within the terms used; for not only does the interpretation clause (s. 2) of the Lands Clauses Act, say that the word "promoters" of the undertaking shall include "commissioners," evidently, therefore, including persons who have no interest in the work they undertake; but s. 151 of the defendants' special act (18 & 19 Vict. c. 120), which incorporates the Lands Clauses Act, in express words says that the defendants are included in that term. There is, therefore, every ground for saying that s. 133 would comprehend the defendants, and, to a considerable extent, a good reason may be discovered why in the present case it should comprehend them; for, assuming that land is taken which will not be subject to rates when the works are completed, yet it is now in an uncertain condition, and the parish gets neither the benefit of the new street nor the additional value of the remaining property which will result from the street being opened, and therefore now suffers a loss without any equivalent advantage. The provision of s. 133 is therefore applicable to the case, and there is no difficulty in holding that

(1) Law Rep. 2 C. P. 574.

the payments to be made under it are part of the cost of the new street.

But we are met by this difficulty, that s. 133 supposes that the works when finished will be subject to poor-rates, and that this street will not be so. It may possibly be that the defendants' construction of the act is so far right, that the clause is to be read with the qualification, "where the character of the works is such that, when completed, they will be subject to poor-rates." It may be so; and it would certainly be strange if the promoters are to make good the deficiency caused during the progress of their works, although as soon as the works are completed the parish will for ever be deprived of the assessment. But, however that may be, it cannot at the present time be concluded that the defendants' works, when completed, will not be subject to rates. When we look at 26 & 27 Vict. c. 45, ss. 9, 11, it is plain that the defendants will, in point of fact, always be owners of the street, and that in respect of their powers of enjoyment—as, for instance, by a subway—there may be a beneficial occupation subject to assessment, although, so far as there is no such occupation, it may not, as to the portion in that predicament, be either subject to poor-rates or within s. 133. If commissioners were appointed to make a road, and took no land but such as would be turned into the road, and, in fact, so made the road that no part of the land could ever be sold, or could ever be beneficially occupied, then the difficulty presented to us by Mr. Raymond would arise. But I cannot see that this land will ever be so used, for it is not only admitted that land has been taken which will never be used for the road, and will be ultimately disposed of; but the highway itself may become actually the property of the defendants, with a capacity of beneficial occupation and liability to rating. Therefore, supposing the section to be applicable only where there will hereafter be some such beneficial occupation, we cannot now say whether this road will or will not be capable of such an occupation; as at present advised, however, I am inclined to think that the section was not meant to apply unless the lands taken could, when the works were completed, be capable of a beneficial occupation. The case, therefore, is within the words of the section, and is also within the reason of it; the difficulty raised has no present

1869

WHEELER v. METROPOLITAN BOARD OF WORKS.

application, for the whole land may or may not be turned to a public use; if it is so, however, the 133rd section ought probably to be read in the restricted way suggested.

CHANNELL, B. I am of the same opinion. I agree that what was said upon this point in the Common Pleas was not necessary to the decision of the case; but it applies directly to the construction of s. 133, and we shall be glad to adopt that view, if we can find reasons sufficient to support it. Now, without saying what may be the effect of the section in some future state of circumstances, it is enough for us to say that in the present state of things the plaintiffs are entitled to recover, and therefore, without entering into the discussion of some of the points raised by Mr. Raymond, but without expressing any dissent from the view taken of them by my Brother Bramwell, I think we must give judgment for the plaintiffs.

CLEASBY, B. I am of the same opinion. If the question had been in the proper sense of the term decided by the Court of Common Pleas, I should have done no more than say that I was perfectly satisfied with their decision; but under the circumstances I will add my reasons. It is said the defendants were not "promoters" within s. 133; but referring to their own act (18 & 19 Vict. c. 120, s. 151), we see this very word applied to them. This is not absolutely conclusive, but we must at least see some very good reason for taking them out of the operation of s. 133. Is there, then, any insuperable objection to applying the section to this case? I can see none; and if so, and we find the clause applicable, then any further difficulty which may arise in applying it, must be a matter for legislative interference. But here the supposed difficulty does not exist, for the new works are not completed; it was evidently the intention of the act that the defendants should not by taking lands throw an additional burden on the parish, it was therefore provided that they should make up the deficiency in the poor's rate caused by the taking of the land for the purposes of their works; they must, therefore, pay until the works are completed and assessed. Now it may be that when the works are completed there will be no deficiency, as the improvement

may bring up the value of the remaining property to an amount equal to that of the old houses. Therefore the difficulty in applying the section hereafter may not arise; but at present the case is within both the words and the reason of the statute.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Farrer & Farrer.*

Attorney for defendants: *The Attorney to the Metropolitan Board of Works.*

THE GUARDIANS OF THE EAST LONDON UNION *v.* THE METROPOLITAN RAILWAY COMPANY.

June 22.

Vendor and Purchaser—Land taken under Compulsory Powers—Execution of Conveyance a condition precedent to Action for Price settled by Award.

Where, after notice to treat, the amount of compensation to be paid for land compulsorily taken has been fixed by an award under the Lands Clauses Act, 1845, an action for such compensation cannot be maintained until a conveyance of the land has been executed.

DECLARATION on a statutory award under the Lands Clauses Act, 1845, fixing the compensation to be paid for the plaintiffs premises compulsorily taken by the defendants, at 3250*l.* (1)

Plea: That the plaintiffs have not executed any conveyance of the premises to the defendants.

Demurrer and joinder.

Brown, Q.C. (*J. O. Griffits* with him), for the plaintiffs, contended that the plea was bad; the case differed from that of an ordinary sale, and the execution of a conveyance was not a condition precedent to the owner's right to recover the purchase-money assessed by the award; the defendants might, if they pleased, deposit the purchase-money and execute a conveyance to themselves under 8 Vict. c. 18, ss. 76, 77; and if any difficulty arose relief could be obtained in equity.

Lloyd, Q.C. (*W. G. Harrison* with him), for the defendants,

(1) Various other points were raised upon the pleadings, turning chiefly upon the construction of the declaration and of the award declared upon.

1869

EAST LONDON UNION v. METROPOLITAN RAILWAY CO.

contended that the plea was good; it would be absurd if, because the award had assessed compensation on the assumption that the plaintiffs had title, the defendants should be compelled to pay for land which they had never obtained, and to which the plaintiffs might be unable to make any title; the suggested remedy under 8 Vict. c. 18, ss. 76, 77, could be of no assistance, if in fact the title were in some other persons, whose rights could not be affected by the transaction between the present parties; the difference between the case of land taken by voluntary purchase and sale, and land taken under statutory powers, was only in the mode of arriving at the ultimate rights of the parties, not in the character of the rights acquired, which could not exceed those constituted by an ordinary contract (1); and that the common rule applied, that before requiring payment of the price of anything sold the property in the thing must be transferred; until transfer the remedy was only in damages for breach of contract.

THE COURT (Bramwell, Channell, and Cleasby, BB.) held that the rule laid down in *Laird* v. *Pim* (2) applied to the case of a purchase under statutory powers, and decided that the plea was good.

Judgment for the defendants.

Attorney for plaintiffs: *A. J. Baylis.*
Attorneys for defendants: *Burchells.*

(1) See *Wing* v. *Tottenham and Hampstead Junction Railway Company*, Law Rep. 3 Ch. App. 740.

(2) 7 M. & W. 474.

THOMAS *v.* HAYWARD.

1869
June 23.

Landlord and Tenant—Covenant running with Land—Action by Assignee of Lease against Lessor.

Where in a lease, the lessee having covenanted to use the demised premises as a public-house, the lessor covenants not to build or keep any house for the sale of spirits or beer within half a mile of the demised premises; the lessor's covenant does not run with the land so as to enable the assignee of the lease to sue him upon it.

DECLARATION by the assignee of a lease against the lessor, on a covenant in the lease, by which, the lessee having covenanted for himself, his executors, administrators, and assigns, during the continuance of the term to use and continue the demised house for the sale of spirits, the defendant, for himself, his executors, administrators, and assigns, covenanted "not to build, erect, or keep, or be interested or concerned in building, erecting, or keeping, any house for the sale of spirits or beer within the distance of half a mile from the premises thereby demised, during the continuance of the said term."

Demurrer and joinder.

Brown, Q.C., for the defendant, supported the demurrer. The covenant does not touch the thing demised, but only a particular mode of occupying it; it therefore does not run with the land. *Spencer's Case* (1); *Ricket* v. *Metropolitan Railway Company* (2); *Gorton* v. *Gregory* (3); *Mayor of Congleton* v. *Pattison.* (4)

Ryalls, for the plaintiff, supported the declaration, and cited *Ellis* v. *Mayor of Bridgnorth* (5); *Tatem* v. *Chaplin* (6); and *Hooper* v. *Clark.* (7)

BRAMWELL, B. The covenant does not touch or concern the thing demised. It touches the beneficial occupation of the thing, but not the thing itself; and this becomes manifest when it is con-

(1) 5 Co. 16; 1 Smith's L. C. 45, 6th ed.
(2) Law Rep. 2 H. L. 175.
(3) 3 B. & S. 90; 31 L. J. (Q.B.) 302.
(4) 10 East, 130.
(5) 15 C. B. (N.S.) 52, at p. 78; 32 L. J. (C.P.) 273.
(6) 2 H. Bl. 133.
(7) Law Rep. 2 Q. B. 200.

1869

THOMAS v. HAYWARD.

sidered that, supposing the lessee's covenant to carry on the sale of spirits on the premises to be discharged by agreement between the lessor and lessee, or that without such discharge, the lessee, in fact, discontinued the business, the defendant's covenant would obviously in no way concern the land. This shows that the covenant relates only to the mode of occupying the land, not to the land itself. It does not, therefore, run with the land so as to enable the plaintiff to sue upon it.

CHANNELL, B. I am of the same opinion. A covenant runs with the land only when it touches, that is, when its operation directly, and not merely collaterally, affects the thing demised. It cannot be said that this covenant does so.

CLEASBY, B. I am of the same opinion. It has been argued that this covenant falls within the second resolution in *Spencer's Case* (1), but the covenant there referred to, is described as relating to something "to be done upon some part of the thing demised," such as a new wall to be built thereon, which when built will form part of it, or to some matter otherwise distinctly and directly connected with it, such as rent issuing out of it. But the present covenant is rather within the latter part of the same resolution, where instances are given of covenants which do not run, as "to build a house upon the land of the lessor which is no parcel of the demise." This covenant concerns, not the condition of the land itself, but only the value of trade carried on there, and is in that sense collateral to the land.

Judgment for the defendant.

Attorney for plaintiff: *Elkins.*
Attorney for defendant: *Tatham.*

(1) 5 Co. 16; 1 Sm. L. C. 45, 6th ed.

CAREW *v.* DUCKWORTH.

1869
June 21.

Cheque—Notice of Dishonour—No Effects—Reasonable Expectation of Cheque being Paid.

In an action by the holder against the drawer of a dishonoured cheque, notice of dishonour is excused by want of effects at the time when the drawer would reasonably expect the cheque to be presented for payment, provided the drawer had no reasonable expectation that it would be paid.

The want of effects which will excuse notice of dishonour need not be a want of any effects; it is sufficient if there are no effects sufficient for the payment of the cheque.

DECLARATION by plaintiff as holder of the defendant's cheque on the Agra Bank, Limited, for 30*l.*, averring due presentment and nonpayment, and excusing notice of dishonour on the ground that the bank "had not in their hands sufficient or any effects of the defendant for payment of the said cheque or order, nor had they received any consideration for the payment by them of the said cheque or order, nor had the defendant at any time any reasonable ground to expect that the said Agra Bank, Limited, would pay the said cheque or order, nor has the defendant sustained any damage by reason of not having notice of the nonpayment by the said Agra Bank, Limited, of the said cheque or order."

The 14th plea traversed the averments in the declaration excusing notice. Issue.

The cause was tried before Pigott, B., at the Middlesex sittings in Trinity Term. It was proved that the cheque was given after banking hours on the 25th of February, and it was then agreed that it should not be presented for several days. The defendant then had 106*l.* in the bank. The cheque was presented on the 10th of March, and dishonoured.

On the morning of March 2, the balance in the defendant's favour was 18*l.* 17*s.* 2*d.*; in the course of the day 48*l.* 6*s.* 8*d.* was paid in, and 58*l.* 5*s.* 2*d.* was drawn out, leaving a balance of 8*l.* 18*s.* 8*d.*; and from that day to the 10th of March, the largest sum in the bank to the defendant's credit was 9*l.* 8*s.* 4*d.* On the 10th 107*l.* was paid in, and 99*l.* drawn out, which left to the defendant's credit a balance of 1*l.* 15*s.* 11*d.*

1869

CAREW v. DUCKWORTH.

It was also proved that the defendant had on a former occasion overdrawn his account, and that the bank had thereupon given him notice they would not honour overdrafts.

The jury found all the averments of the declaration in favour of the plaintiff. A verdict was entered for the plaintiff, with leave to the defendant to move to enter a verdict for him. A rule having been obtained accordingly, and for a new trial, on the ground that the verdict was against evidence,

Francis, for the plaintiff, shewed cause. First, the cheque was presented within a reasonable time, its presentment having been deferred at the request of the defendant. (1) It was a question for the jury, and they have found in favour of the plaintiff. Had the defendant, then, either funds at the bank to meet the cheque, or any reasonable ground for expecting that it would be paid? It is certain that if the drawer has neither, he is not entitled to notice of dishonour: *Legge* v. *Thorpe* (2); except where he has a remedy over against some third person of which want of notice may deprive him, as in *Cory* v. *Scott* (3), where the bill was drawn for the accommodation of the first indorsee. The reason of the rule requiring notice of dishonour, viz., the utility of notice, was clearly laid down in the judgments in *Cory* v. *Scott* (4), and the principles there laid down shew that notice was here unnecessary. The cases of *Hammond* v. *Dufrene* (5), and *Blackhan* v. *Doren* (6), where notice was held necessary, are entirely in harmony with this rule: in the former case, it was shewn that before the bill became due the acceptor had in his hands a sum sufficient to meet the bill, and Lord Ellenborough's observations were made in answer to the contention that the mere fact that there were no assets in the acceptor's hands at the time of drawing the bill excused notice; in the latter case, there was a fluctuating balance, and the assets were insufficient only because of an uncommunicated act of appropriation by the drawees. But in the present case, from the 2nd to the 10th of March there was neither at the beginning nor at

(1) See *Hopkins* v. *Ware*, ante p. 268; *Alexander* v. *Birchfield*, 7 M. & G. 1061.
(2) 2 Camp. 310.
(3) 3 B. & A. 619.
(4) 3 B. & A. at p. 622–5.
(5) 3 Camp. 145.
(6) 2 Camp. 503.

the end of any day sufficient to meet the cheque, and there was no reason to suppose that the bank would have paid an overdraft. The defendant's contention must be, that if there be any effects at all, the drawer is entitled to notice; but the reason of the rule is against this view, for if there are neither sufficient effects in fact, nor any reasonable ground for the drawer to think the bill will be met, he cannot be injured by want of notice. The plaintiff's contention is in accordance with the rule laid down as to cheques by Lord Denman, C.J., and Patteson, J., in *Robinson* v. *Hawksford* (1); the drawer of a cheque appropriates the sum to the payment of the cheque, and has no right afterwards to divert it to other uses.

J. Sharpe (*Parry, Serjt.*, with him), for the defendant, supported the rule. The general rule requires notice of dishonour; and the rule is the same for cheques as for bills: *Kemble* v. *Mills.* (2) Till *Bickerdike* v. *Bollman* (3), so far as the decisions of the Courts went, this rule was without exception; and the exception then introduced has been regretted as creating uncertainty and irregularity in the law and in habits of business: see per Lord Ellenborough in *Orr* v. *Maginnis* (4) and *Blackhan* v. *Doren* (5), and Lord Tenterden in *Cory* v. *Scott.* (6) But the exception has been rigorously limited; and *Orr* v. *Maginnis* (7) and *Dennis* v. *Morrice* (8) are clear decisions that nothing will excuse want of notice if there are funds of the drawer in the hands of the drawee at the time the bill is drawn. Now here, as in *Blackhan* v. *Doren* (9), a fluctuating balance existed in the hands of the bankers during the whole time. The expressions of Lord Ellenborough in *Thackray* v. *Blackett* (10) are exactly applicable to the present case: "If there was an open account between the parties, and the acceptors were indebted in any sum to the drawer before the bills became due, I cannot say that he must necessarily have been aware beforehand that either of them would be dishonoured." That case, moreover, resembles the present in the circumstance that there were there two bills, one of which might have been met, but both could not; so here,

(1) 9 Q. B. at p. 57.
(2) 1 M. & G. 757, 761, 767.
(3) 1 T. R. 405.
(4) 7 East, at p. 362.
(5) 2 Camp. at p. 504.
(6) 3 B. & A. at p. 622.
(7) 7 East, 359.
(8) 3 Esp. 158.
(9) 2 Camp. 503.
(10) 3 Camp. 164, 165.

1869

CAREW v. DUCKWORTH.

if other drafts had not been paid, this cheque might have been honoured. The hardship of a decision for the plaintiff is shewn by cases where (as is the practice with the Bank of England) a cheque is invariably refused if it exceeds by 6*d.* the amount of assets.

BRAMWELL, B. I cannot think that the law on this point is in a very satisfactory condition. The true rule should be, that no notice of dishonour is required where it would convey no information, that is, when the party sued knew beforehand that the bill would not be paid; but that where he did not know, it is right that he should be informed of the nonpayment. If this rule should be adopted, the question would be, did he, practically speaking, know beforehand that the bill would not be honoured? This may depend on a variety of circumstances; he might think that the cheque would be honoured by favour, though, in fact, there were no assets to meet it. But though this ought to be the rule, at all events in the case of cheques (and I am not sure that it is not the rule in fact), yet it is not always to be found laid down in these terms, and perhaps it could not be established without doing violence to some of the cases.

The first question then is, had the defendant funds in the hands of the bank to meet this cheque? which here becomes the question, whether there was evidence from which the jury could find this fact in the negative? The defendant had the sum of 106*l.* in the bank at the time when he drew the cheque, but the question of his right to notice of dishonour must be considered in connection with his request that the cheque should not be presented for several days. Now the important question is, whether the drawer thinks that there will be funds to meet the draft, whether bill or cheque, when it is presented for payment? If I, in London, draw on a bank in York, where I have 1000*l.*, which I know will be drawn out to-day, while the cheque cannot be presented till to-morrow, it is idle to say that, knowing there will be no funds there at any time when the cheque can be presented, I am entitled to notice of dishonour. The question therefore is, what was the state of the funds at the time when the bill ought in regular course to have been presented? Then the question arises, what is the meaning of several days or a few days? The jury may well have thought that it at least post-

poned the presentment till the 2nd of March. Now from March the 2nd till the 10th, when the cheque was actually presented, there was not at any time a greater sum than 9*l.* 8*s.* 4*d.* available for its payment. There was evidence in the accounts to show that the defendant paid in money to his account, but he at once drew out as much as he paid in, or the money was so paid in and dealt with that it was not applicable to the payment of this cheque. This was evidence on which the jury might find that the defendant had not, in fact, funds in the bank at the time when the bill was presented.

But Mr. Sharpe says, that if there were any funds, the defendant was entitled to notice of dishonour. This cannot be so; the question must be whether, practically, there were funds to such an amount as that at the time of drawing he could reasonably expect payment? For though the expression "any funds" is used in some cases, it is preposterous to suppose that because there was an old balance of 5*s.* to the credit of a customer, he would therefore be entitled to notice of dishonour of a cheque for 5000*l.* The question then must be, whether there were any such funds as the drawer might reasonably and properly draw against, with an expectation that the draft would be honoured. We may read the allegation in the declaration that the defendant had not sufficient, nor any, funds for the payment of the cheque, as meaning that he had no funds adequate for its payment, no funds against which he was entitled to draw the cheque in question. Therefore, as to this first question, I think there was evidence for the jury that there were no such funds in hand, from the time when the defendant would expect the cheque to be presented up to the time when it was presented in fact, as to give him ground to suppose that the cheque would be honoured, and I think that this fact was rightly so found. Secondly, it is quite plain that there was evidence for the jury that the defendant had no reason to expect that the cheque would be honoured; and I also think that they were right in so finding. There were eight entire days after the time when the defendant might first expect the cheque to be presented, on none of which had he any reason to expect that it would be paid, for he had no right to expect that any cheque would be paid which he had not sufficient effects to meet.

1869

CAREW v. DUCKWORTH.

CHANNELL, B. I am of the same opinion. There is no ground for saying either that the verdict was against evidence, or that there was no evidence to go to the jury in support of the declaration. The evidence was that the cheque was not to be presented for a few days; the jury have found that when it was presented a reasonable time had elapsed, and I think they were warranted in so finding. There had been then eight days during which there were no funds in the hands of the bank to meet the cheque. There is, therefore, no ground to contend that the defendant had a reasonable expectation of the cheque being paid; and the case bears no resemblance to cases where funds might be expected to come in —as, for instance, in the case of a landlord whose tenants were accustomed to pay their rents into the bank, and who had therefore a right to expect there would be assets to meet his draft, and might perhaps, for want of notice, lose his opportunity of recovering rent by distress.

CLEASBY, B. I am also of the same opinion. The issue is distinct, and involves the question whether the defendant had reasonable ground for expecting that the cheque would be paid. That this is a material question, appears from *Kemble* v. *Mills* (1), where the declaration being objected to, Tindal, C.J., says: "I suppose the objection is, that it is not stated that the defendant had no reason to expect that the bill would be paid;" this shows (though the declaration was in that case held sufficient) that the allegation of want of reasonable ground for the expectation of payment is an important and a necessary averment, and is, therefore, an essential matter for consideration. The existence of such reasonable ground must obviously be a question for the jury. Now, here the cheque was given with a request that it should not be presented for a few days, but it is nevertheless said that if at the time of drawing it there were funds, the drawer is entitled to notice of dishonour. But can it be said that after a cheque has been given with such a request, and its drawer next day draws out the whole of his funds, and never afterwards pays in a farthing, nor has any reasonable expectation of funds coming in, so that he must

(1) 1 M. & G. 757, 761.

well know that there never can be any funds to meet the cheque, he is not completely aware that the cheque will not be paid in fact? Then put the case of a small sum being paid in, quite insufficient to satisfy the cheque, the question will still be, was there any reasonable expectation that there would be funds to meet the cheque? The jury have found that the defendant had no reasonable expectation that the cheque would be paid, and I think there was sufficient ground for that finding.

BRAMWELL, B. I wish to add, that if there were funds in the hands of the bank sufficient to meet the cheque, the drawer would be entitled to notice though he knew that the bank would not honour the cheque, for he would be entitled to say they were bound to honour it, even though they had told him they would not.

Rule discharged. (1)

Attorney for plaintiff: *Carew.*

Attorneys for defendant: *Thomson & Son.*

CASE, APPELLANT; STOREY, RESPONDENT.

May 31.

Hackney Carriage—Railway Station—"Public Street or Road"—"Street or Place"—"Plying for Hire"—1 & 2 Wm. 4, c. 22, ss. 4, 35—16 & 17 Vict. c. 33, s. 17.

A hackney carriage whilst on the premises of a railway company by their leave for the accommodation of passengers by their trains, is not "plying for hire" in any "street or place" within the meaning of the Hackney Carriage Acts, and the driver of such carriage cannot under those acts be compelled to convey any person desirous of hiring it.

Semble (per Bramwell, B.), if the driver consents to be hired, the regulations of the Hackney Carriage Acts as to the amount of fare payable will attach.

CASE stated by a Metropolitan Police Magistrate under 20 & 21 Vict. c. 43.

A complaint was preferred by the appellant against the respondent

(1) See Byles on Bills, 8th ed., 274, et seq.; Parsons on Bills, pp. 545–8.

1869
CASE
v.
STOREY.

that the respondent, the driver of the hackney carriage No. 3435, did in a certain public place, to wit, the Great Northern railway station at King's Cross, in the parish of St. Pancras, and within the metropolitan police district, refuse to drive the said carriage to a certain place, not exceeding six miles, to which he was required to drive the appellant. The following facts were proved at the hearing:—

The appellant went to the Great Northern Railway station, within which, on a rank of cabs by the side of the arrival platform, was the respondent's cab. The respondent had been admitted into the station with his cab by the railway company, for the purpose of accommodating passengers arriving by their trains. The station is the private property of the company. The appellant who had not on the occasion in question been a passenger by any train, but had entered the company's premises from the street, required the respondent, whom he found standing on the arrival platform near the cab, to drive him to Camden Town (a place less than six miles off), but upon learning that the appellant had not arrived by train, the respondent declined to drive him. This was the offence complained of. On the part of the appellant it was contended that the respondent was bound to drive him, and in refusing made himself liable to a penalty under 1 & 2 Wm. 4, c. 22, ss. 35, 42, and 16 & 17 Vict. c. 33, s. 17. The respondent, on the other hand, urged that the Great Northern railway station was private property, and that he and all other cabmen who entered the station to take passengers were either hired by the company, or, at all events, were on private ground under the company's license, and not in any "street or place," and could not be said to be "plying for hire" within the meaning of the Hackney Carriage Acts. The magistrate determined that a railway station being the private property of the railway company, the company might at their pleasure admit or exclude cabs, or, as in the case of the Great Northern, admit them on such conditions as they might think fit to impose, and that, under these circumstances, cabmen coming into the station under the license of the company could not be said to be plying for hire under, and to be when there governed by, the rules laid down in the Hackney Carriage Acts, but were, whilst within the station, governed in their dealings with the public by

1869

CASE
v.
STOREY.

the ordinary law of contract. He accordingly dismissed the summons. The question for the opinion of the Court was whether his decision was right.

The 1 & 2 Wm. 4, c. 22, s. 4, enacts that, "every carriage with two or more wheels which shall be used for the purpose of standing or plying for hire in any public street or road at any place within the distance of five miles from the General Post Office, in the city of London (1) . . . shall be deemed and taken to be a hackney carriage within the meaning of this act."

S. 35 enacts that, "every hackney carriage which shall be found standing in any street or place, and having thereon any of the numbered plates required by this act to be fixed on hackney carriages (2) shall, unless actually hired, be deemed to be plying for hire, although such hackney carriage shall not be on any standing or place usually appropriated for the purpose of hackney carriages standing or plying for hire; and the driver of every such hackney carriage which shall not be actually hired shall be obliged and compellable to go with any person desirous of hiring such hackney carriage; and upon the hearing of any complaint against the driver of any such hackney carriage for any such refusal, such driver shall be obliged to adduce evidence of having been and of being actually hired at the time of such refusal, and in case such driver shall fail to produce sufficient evidence of having been and of being so hired as aforesaid, he shall forfeit 40*s.*"

S. 42 enacts that, "if the driver of any hackney carriage shall refuse to go with any person desirous of hiring his carriage for the legal and proper fare allowed by this act . . . or if the proprietor or driver of any hackney carriage shall exact or demand for the hire thereof more than the proper sum limited and allowed for the

(1) By 6 & 7 Vict. c. 86, s. 2, the "limits of the city of London and the liberties thereof and metropolitan police district" are substituted for the above limit of five miles from the General Post Office.

(2) S. 6 provides that hackney carriages are not to be kept or used without licenses and numbered plates. S. 22 imposes on the owner of a hackney carriage kept or used without licence, or without a numbered plate, a penalty of 10*l.* S. 23 imposes a 5*l.* penalty on the driver of any carriage without a numbered plate "used for the purpose of standing or plying for hire as a hackney carriage in any public street or road, at any place" within five miles of the General Post Office.

1869

CASE v. STOREY.

same by this act, every such proprietor or driver so offending shall forfeit 40*s*."

The 16 & 17 Vict. c. 33, s. 7, requires a hackney carriage driver, unless he have a reasonable excuse, to drive to any place not more than six miles from the place where he is hired, to which the hirer may order him to drive; and s. 17 imposes a penalty on him if he refuse.

Hon. G. Denman, Q.C. (*Hume Williams* and *Burford Hancock*, with him), for the appellant, contended that the terminus of a railway company, being a place of public resort though private property, was a "street or place" within the meaning of 1 & 2 Wm. 4, c. 22, s. 35, the terms of which were wide and general; and that the respondent's hackney carriage was "plying for hire" at the Great Northern station when the appellant claimed to hire it, within the meaning of that act and of the other Hackney Carriage Acts. The result of holding the contrary would be to place the public at the mercy of hackney carriage drivers at railway stations. [He also referred to 1 & 2 Wm. 4, c. 22, ss. 4, 6, 7, 20, 24, 34, 42; to 6 & 7 Vict. c. 86, s. 29, and 13 Vict. c. 7, s. 5, authorizing the police commissioners to appoint standings at such "places" as they should think fit; and to 16 & 17 Vict. c. 33, s. 17.]

J. Brown, Q.C. (*A. Wills* with him), for the respondent, was not called on.

KELLY, C.B. In this case the question is whether the respondent under the circumstances was bound to allow himself to be hired by the appellant, and the answer principally depends on the construction to be placed on certain of the sections of 1 & 2 Wm. 4, c. 22. Now the 4th section of that act defines a "hackney carriage" to be "every carriage with two or more wheels which shall be used for the purpose of standing or plying for hire in any public street or road at any place within the distance of five miles from the General Post Office in the city of London," whatever may be the form or construction of such carriage or the number of persons it is calculated to convey, or the number of horses it may be drawn by. First, then, was the carriage in this case "standing or plying for

hire?" Those words must mean that the carriage is to be at the disposal of any one of the public who may think fit to hire it. I think, therefore, that they are not applicable here. The railway company, it appears, allow a number of cabs to come upon their premises, and there await the arrival of the trains in order to provide accommodation for the arriving passengers. In one sense, these cabs are undoubtedly plying for hire, but they are not so plying in a general sense, but only to such an extent and subject to such regulations as the license given to them by the railway company may admit. To what extent, and subject to what regulations, must depend on the particular terms of the license in each case. For example, there might be an agreement between a company and the cabmen they allowed to enter their station as to the order in which passengers should be taken up, and so forth. But whatever particular arrangement might be made, the hackney carriages subject to it could not be said to be "standing or plying for hire," which must mean ready at any moment to be hired by any one of the public.

Then, secondly, we have to consider the subsequent words of the definition "in a public street or road." It is clear to me that railway stations are not either public streets or public roads. They are private property; and although it is true they are places of public *resort*, that does not of itself make them public places. The public only resort there upon railway business, and the railway company might exclude them at any moment they liked, except when a train was actually arriving or departing. For the proper carrying on of their business they must necessarily open their premises, which are nevertheless private, and in no possible manner capable of being described as public streets or roads.

I am of opinion, then—first, that the respondent's carriage was not "standing or plying for hire;" and secondly, that at all events it was not so standing or plying for hire, as s. 4 of the act requires, in a "public street or road." The driver, therefore, was not liable to the penalty imposed by s. 35 for refusing to take a fare. In that section, it is true, the penalty is imposed on the driver of every numbered hackney carriage standing or plying for hire "in any street or place," words differing somewhat from those

1869

CASE v. STOREY.

of s. 4, which however must be taken to govern the whole act. But even these words would not include this case. Mr. Denman argued that "place" is a large term; but we must take it as only meaning a place ejusdem generis with a street. The decision at which I have arrived may possibly lead to some inconvenience to the public. If so, it will become the duty of the railway companies to obviate it by making proper regulations with the cabmen whom they authorize to enter their stations. The case really seems to me exactly analogous to that of an owner of a park permitting cabmen to come and stand within his grounds in order to accommodate his departing guests; and it could not be contended that, in that case, any passer-by might enter the park and insist on one of the cabmen there carrying him as a passenger. My judgment, therefore, is for the respondent.

BRAMWELL, B. I am of the same opinion, and have only a few words to add. Section 35 of 1 & 2 Wm. 4, c. 22, is very inartificially drawn; but the plain English of it is that the driver of every hackney carriage with a number on it found in any street or place shall, if he be not hired already, be obliged to take any person who desires to engage him. Well, then, was the respondent the driver of such a carriage? Certainly not. The section cannot be meant to apply to a place to which the public have no right of access. Otherwise this absurd consequence might follow, that even in his master's yard he would be obliged to take any one who chose to come into the yard and ask him. Again, it is to be noticed that the driver is to be under no obligation unless the carriage has a numbered plate on it; and s. 23 imposes a penalty on the driver of a carriage without a numbered plate, standing or plying for hire "in any public street or road." Now, a hackney carriage might ply at a railway station without a plate, for such a place cannot be a public street or road, and then supposing more than the legal fare was demanded, the driver would nevertheless not be liable to a penalty under s. 42, for the whole act only applies to numbered cabs. The result would be that, if the magistrate was wrong, all that a cabdriver would have to do would be to take off his plate before entering a station. Nor does s. 22 affect the matter, for I think it imposes a penalty on the *keeping* only of un-

numbered cabs not on plying with them, a case provided for by s. 23, which inflicts a penalty of 5*l.* on the driver and 10*l.* on the owner. Reading s. 42, therefore, with s. 23, it seems to me manifest that the "street or place" mentioned in s. 35 must be the same thing as the "public street or road" mentioned in s. 23, and that neither section can include the premises of a railway company.

But it is said that on this construction of the act people who hire cabs at railway stations will be at the cabman's mercy. For two reasons this will not happen. First, there are the railway authorities, who will take care that nothing of the sort occurs. Moreover, s. 42 imposes on the driver of a numbered cab a penalty for asking more than the statutory fare in unqualified terms, and without regard to the place where and the person by whom he was hired in the first instance. It might perhaps be said that section only applies when a driver is *bound* to agree to be hired upon anybody's request, and not where he has an option as at a railway station; but I think it applies to all drivers when once hired, no matter where. However this may be, the public can be amply protected from any extortion by the railway companies, who, whilst admitting certain cabs into their premises, may insist on whatever terms they think proper.

CHANNELL, B. I am also of opinion that the magistrate's decision was right. The case turns on s. 35 of 1 & 2 Wm. 4, c. 22, which is certainly not very accurately worded. The intention of the section doubtless was to prevent a cabdriver from capriciously refusing a fare. The common mode of doing so used to be by drawing off a stand, and then declining to allow the cab to be engaged, and to prevent this mischief it was enacted that every driver of a hackney carriage standing or plying for hire in any street or place should be compellable to go with any person desirous of hiring him, whether the carriage was or was not on the usual "stand." But the street or place meant must be a street or place where both the driver and hirer may lawfully be. Now here both elements are wanting. The cabman had no *right* to be on the railway company's premises. He was allowed to be there by the company for the accommodation of the public who might happen to be passengers by the trains. Then, again, the person

1869

CASE v. STOREY.

who claimed to hire the respondent, had no right to be on the railway premises at all. I think therefore the provisions of s. 35 are not applicable to this case.

CLEASBY, B. I am of the same opinion. It is not necessary to decide the case on narrow grounds. The whole scope of the act is applicable to a public matter; to cases where the cabman is performing a public duty with reference to the hirer as one of the public. The language of s. 4 entirely supports this view, and governs the whole act, and I think therefore s. 35 only applies to a "street or place" where the cabman himself has a right to be, and where anybody who may wish to hire him has a right to be also. A railway station cannot be such a place, for at any time the company might exclude all cabs if it so pleased them, and some companies do admit the cabs of one proprietor only. The legality of such a course was established in *Beadel* v. *Eastern Counties Railway Company* (1), where an injunction was asked for against the company by one of the excluded cab proprietors. But the Court refused the application on the ground that no inconvenience was inflicted on the public. There has been none suggested in the present case, and I am of opinion therefore that our judgment should be for the respondent.

Judgment for the respondent.

Attorney for appellant: *J. T. Fry.*
Attorneys for respondent: *Wontner & Son.*

(1) 2 C. B. (N. S.) 509; 26 L. J. (C.P.) 250.

IN THE MATTER OF THE ESTATE AND EFFECTS OF JOHN GREENWOOD, DECEASED.

1869
June 4.

Practice—Right to begin—Summons under Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51)—*Petition of Appeal—Legacy Duty Acts* (16 & 17 Vict. c. 51, ss. 47-64).

WRIT OF SUMMONS under 16 & 17 Vict. c. 51, ss. 47, 48, to W. M., the executor of John Greenwood, deceased, and also trustee of certain property to which certain persons became entitled as successors, upon the death of John Greenwood, calling upon W. M. within fourteen days to deliver an account on oath of all the legacies, &c., of J. Greenwood, paid or to be paid by him the said executor; and also an account of all the property to which the persons aforesaid became beneficially entitled as such successors as aforesaid, on the death of John Greenwood, and to pay the legacy or succession duty chargeable thereon; or within the same time to appear and shew cause why he made default in the premises. An appearance was duly entered to the writ, and an affidavit was filed in answer to it, upon which

Crompton appeared to shew cause.

Sir J. D. Coleridge, S. G. (*Sir R. P. Collier, A. G.*, and *C. Hutton* with him), claimed, on the part of the Crown, the right to begin. The burden of proof lay on the Crown to establish that *any* duty was payable. This was not a case where liability to *some* duty was admitted, and where the quantum only was in dispute.

THE COURT (Kelly, C.B., Bramwell, Channell, and Cleasby, BB.), after making inquiries as to what was the previous practice on writs of summons similar to the present, and finding that it had varied, held that the most convenient and proper course was to call on the Crown to begin.

Attorney for the Crown: *The Solicitor of Inland Revenue.*
Attorneys for executor: *Wright & Venn.*

IN THE MATTER OF DE LANCEY'S SUCCESSION.

June 4.—This was a petition of appeal under the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 50, against an assessment made by the Inland Revenue

1869

IN RE DE LANCEY.

Commissioners on the petitioner, in respect of a succession alleged to accrue to him under the will of James De Lancey.

Sir J. B. Karslake, Q.C. (*Townsend*, of the Chancery Bar, with him), for the petitioner, claimed the right to begin. Here, the only question was as to the amount of duty payable, and the onus of showing that it was less than the Crown demanded was on the petitioner. In *In Re Earl Cowley's Succession* (Law Rep. 1 Ex. 288), the petitioner began in accordance with the practice as settled by *In Re Micklethwait* (11 Ex. 452). [He also referred to the practice of the Court in calling on the appellant to begin in cases stated by the Commissioners of Inland Revenue, pursuant to 13 & 14 Vict. c. 97, in order that there may be an appeal from their determination as to the stamp duties chargeable on certain instruments, such as deeds of conveyance, mortgages, &c.: see *Marquis of Chandos* v. *Inland Revenue Commissioners* (6 Ex. 464), which settled the practice, and was followed by *In Re Gill's Conveyance* (8 Ex. at p. 380, n.), and by succeeding cases, of which the latest is *Lord Foley* v. *Inland Revenue Commissioners* (Law Rep. 3 Ex. 263).]

Sir R. P. Collier, A. G. (*Sir J. D. Coleridge, S. G.*, and *C. Hutton*, with him), for the Crown.

THE COURT (Kelly, C.B., Bramwell, Channell, and Cleasby, BB.), intimated that in this case where the fact of some duty being payable was admitted, they would adhere to their practice as already settled, and permit the petitioner to begin.

Attorneys for petitioner: *Townsend, Lee, & Houseman.*
Attorneys for the Crown: *The Solicitor of Inland Revenue.*

July 5.

[IN THE EXCHEQUER CHAMBER.]

CLIMIE *v.* WOOD.

Trade Fixtures—Mortgage—Mortgagor and Mortgagee.

Trade fixtures which have been annexed to the freehold for the more convenient using of them, and not to improve the inheritance, and which are capable of being removed without any appreciable damage to the freehold, pass under a mortgage of the freehold to the mortgagee.

APPEAL by the plaintiff from a decision of the Court of Exchequer making absolute a rule to enter a verdict for the defendant. (1)

June 21, 22. The case was argued by

Hon. G. Denman, Q.C. (*Simpson* with him), for the plaintiff, and by *H. Matthews, Q.C.* (*Channell* with him), for the defendant.

(1) Law Rep. 3 Ex. 257; where the facts are fully stated.

The following authorities, in addition to those referred to in the Court below, were cited during the argument:—

Sumner v. *Bromilow* (1); *Ex parte Cotton* (2); *Trappes* v. *Harter* (3); *Wood* v. *Hewett* (4); *Mant* v. *Collins*, cited in *Wood* v. *Hewett* (5); *Lawton* v. *Lawton* (6); *Ex parte Quincey* (7); *Lawton* v. *Salmon* (8); *Dudley* v. *Warde* (9); *Boyd* v. *Shorrock* (10); *Ex parte Barclay* (11); *Ex parte Belcher* (12); *Parsons* v. *Hind* (13); Williams on Executors, 6th ed. vol. i. p. 686; Amos & Ferrand on Fixtures, 2nd ed. pp. 1, 138, 215.

Cur. adv. vult.

July 5. The judgment of the Court (Willes, Keating, Blackburn, Mellor, Montague Smith, Lush, Hayes, and Brett, JJ.), was delivered by

WILLES, J. The question in this case turns upon whether a claimant under the mortgagees of certain land or the purchaser from the mortgagor is entitled to an engine and boiler employed in a sawmill on the mortgaged premises and erected under the circumstances and in the manner proved at the trial. The Court of Exchequer held that the claimant under the mortgagees was entitled, and we are of opinion that their judgment ought to be affirmed. There is no doubt that sometimes things annexed to land remain chattels as much after they have been annexed as they were before. The case of pictures hung on a wall for the purpose of being more conveniently seen may be mentioned by way of illustration. On the other hand, things may be made so completely a part of the land, as being essential to its convenient use, that even a tenant could not remove them. An example of this class of chattel may be found in doors or windows. Lastly, things may be annexed to land, for the purposes of trade or of domestic convenience or ornament, in so permanent a manner as really to form a part of the land; and yet the tenant who has erected them is entitled to remove them during his term, or, it may be, within a reasonable time

(1) 34 L. J. (Q.B.) 130. 11 Jur. N.S. 481
(2) 2 M. D. & D. 725.
(3) 2 C. & M. 153.
(4) 8 Q. B. 913.
(5) 8 Q. B. 913; at p. 916.
(6) 3 Atk. 13.
(7) 1 Atk. 477.
(8) 1 H. Bl. 259 (n.)
(9) Amb. 113.
(10) Law Rep. 5 Eq. 72.
(11) 5 D. M. & G. 403. 1 Jur. N.S. 1145.
(12) 2 Mont. & A. 160.
(13) 14 W. R. 860.

1869

CLIMIE v. WOOD.

after its expiration. Now in the present case we think, upon the evidence and findings of the jury, that the engine and boiler belonged to this last class, and if erected by a tenant might have been removed by him during his term; and in this view we are supported by the authority of *Lyde* v. *Russell*. (1) The reasons, however, for a tenant with a limited interest being allowed to remove trade fixtures, are not applicable to the owner of the fee. Thus in *Fisher* v. *Dixon* (2), they were held not to apply as between heir at law and executor, and the language of Lord Cottenham (at p. 328) explains the distinction between landlord and tenant on one hand, and heir at law and executor on the other. "The principal stress of the argument on the side of the appellant [the executor]" he says, "has been that this [machinery] is to be protected, because it is necessary for the encouragement of trade that this property should be considered not as belonging to the real estate, but as belonging to the personal estate. The principle upon which a departure has been made from the old rule of law in favour of trade appears to me to have no application to the present case. The individual who erected the machinery was the owner of the land and of the personal property which he erected and employed in carrying on the works; he might have done what he liked with it; he might have disposed of the land; he might have disposed of the machinery; he might have separated them again. It was therefore not at all necessary in order to encourage him to erect those new works which are supposed to be beneficial to the public that any rule of that kind should be established, because he was master of his own land. It was quite unnecessary, therefore, to seek to establish any such rule in favour of trade as applicable here, the whole being entirely under the control of the person who erected this machinery." And we are of opinion, that the decisions which establish a tenant's right to remove trade fixtures do not apply as between mortgagor and mortgagee any more than between heir at law and executor. The irrelevancy of these decisions to cases where the conflicting parties are mortgagor and mortgagee was pointed out in *Walmsley* v. *Milne* (3), and we concur with the observations made in that case by the Court of

(1) 1 B. & Ad. 394. (2) 12 Cl. & F. 312.
(3) 7 C. B. (N.S.) 115; 29 L. J. (C.P.) 97.

Common Pleas. Here, therefore, we have come to the conclusion that the verdict was rightly directed by the Court of Exchequer to be entered for the defendant who represented the mortgagees, and that the plaintiff, who had no claim beyond what he derived from the mortgagor, was not entitled to recover.

1869

CLIMIE v. WOOD.

Judgment affirmed.

Attorney for plaintiff: *Leefe.*
Attorneys for defendant: *Chester & Urquhart.*

GODWIN AND ANOTHER *v.* STONE AND ANOTHER.

May 31.

Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *ss.* 192, 198—*Sheriff—Action for not Arresting—Certificate of Registration of Deed of Arrangement—Deed pleadable but not pleaded—Protection against Execution.*

To a declaration for not executing a writ of ca. sa. against a debtor, the defendants pleaded that they had not arrested the debtor, because subsequently to the accrual to the plaintiffs of the claim for which the judgment in the declaration mentioned was recovered and the writ of ca. sa. issued, and before the delivery of the writ to the defendants, the debtor had executed a deed of arrangement under the Bankruptcy Act, 1861, s. 192, and obtained a certificate of its registration, whereof the defendants had notice. The plaintiffs replied, that the said deed was a deed executed before the commencement of the action, and contained a release, and (if valid) might have been, but was not, pleaded in bar of the action, and that the judgment was signed for want of a plea, and the deed was not assented to by the required number of creditors, and was null and void; of all which the defendants had notice:—

Held, on demurrer, a good replication.

DECLARATION, that the plaintiffs, on the 3rd of June, 1868, recovered judgment in the Court of Exchequer against R. A. Petley for 96*l.* 2*s.* 7*d.*; that thereupon they sued out a writ of ca. sa. on the judgment, directed to the defendants, whereby, &c. [here followed the terms of the writ]; that the writ was duly delivered to the defendants to be executed, &c., yet the defendants did not take the said R. A. Petley, and made default in the execution of the writ.

Plea: That the defendants did not take the said R. A. Petley, for that, subsequently to the accrual to the plaintiffs of the claim

1869

GODWIN v. STONE.

for which the judgment in the declaration mentioned was recovered, and before the delivery to the defendants of the said writ for execution, the said R. A. Petley executed a deed of arrangement with his creditors under the Bankruptcy Act, 1861, s. 192, and a certificate of the filing and registration of the said deed under the hand of the Chief Registrar and the seal of the Court of Bankruptcy was obtained by the said R. A. Petley before the delivery of the said writ for execution to the defendants, whereof they always had notice.

Replication: That the deed of arrangement was a deed containing a release, and was (if valid) pleadable in bar of the action in which the judgment was obtained, and was a deed executed before the commencement of the action; and the judgment was signed for want of a plea; and the deed was not assented to by the required number of creditors, and was null and void; and the defendant in the action did not claim protection under the said deed, of which several premises the defendants had notice before the committal by them of the grievances in the declaration mentioned.

Demurrer and joinder.

Quain, Q.C. (*Day* with him), for the defendants, in support of the demurrer. The replication is bad. First, as to the allegation that the deed was void to the knowledge of the defendants, that circumstance is immaterial. In *Ames* v. *Colnaghi* (1) it was held that the sheriff, notwithstanding notice of the invalidity of a deed of composition, good on its face, executed by a debtor in custody, was bound to release him on production of the certificate of registration. It had previously been decided, that under similar circumstances he was at liberty to release: *Lloyd* v. *Harrison*. (2) But if, though with notice of the invalidity of a deed, he is bound to release one whom he has arrested on production of the certificate, he is justified in not arresting, if he knows the debtor has such a certificate in readiness to defeat execution under the Bankruptcy Act, 1861, s. 198. The sheriff cannot be bound to go through the formality of arresting and then discharging. Secondly, it is alleged that the debtor did not claim his protection. It was not needful that he should do so by anticipation. The time for claim-

(1) Law Rep. 3 C. P. 359. (2) Law Rep. 1 Q. B. 502.

ing it never came, the sheriffs having held their hands. Thirdly, it is further alleged that the sheriffs had notice that the deed was one that might have been, but was not, pleaded, and that therefore it was not (according to *Rossi* v. *Bailey* (1), following the opinions of Bramwell and Channell, BB., in *Staffordshire Banking Company* v. *Emmott* (2)), available as a protection against execution. But it is not reasonable to cast on a sheriff the burden of ascertaining whether the course taken by the debtor would have precluded him in law from claiming protection. *Dignam* v. *Baily* (3) is distinguishable from this case. There the sheriff was held not justified in releasing the debtor who had been arrested on a ca. sa. for a debt *subsequent* to the registration of the deed. *Rossi* v. *Bailey* (1) only establishes that the debtor who neglects to plead a deed shall not avail himself of it. It may, nevertheless, be an excuse for the defendants, just as the certificate of an invalid deed might protect them, though the deed would be useless to the debtor.

Bradford, contrà, was not called on.

KELLY, C.B. Our judgment in this case must be for the plaintiffs. It appears on the record in this case, that the debt for which judgment was signed accrued before the registration of a composition deed by the judgment debtor, and that the debtor might have pleaded it. He failed to plead it, and therefore would not, had he been arrested, have been entitled to the benefit of the deed to defeat execution: *Rossi* v. *Bailey*. (1) The consequence is that, according to the principle of *Dignam* v. *Baily* (3), the sheriff was bound to execute the writ; and if he had done so, the debtor would not have been entitled to his discharge. It is true that the present is the first action against a sheriff in which this point has arisen, and, for my own part, were the matter res integra, I should be disposed to hold it unreasonable that he should be liable under such circumstances as these for not executing the writ. It seems to me to place him in a situation in which no public officer ought to be placed. Still I feel bound by the authority I have quoted, which in principle amounts to this, that if the sheriff have notice (as this record alleges the defendants here to have had) that the

(1) Law Rep. 3 Q. B. 621. (2) Law Rep. 2 Ex. 208.
(3) Law Rep. 3 Q. B. 178.

1869

GODWIN v. STONE.

deed might have been pleaded, and that it was not pleaded, he must arrest the debtor. I confess it appears unreasonable to impose such a duty on a sheriff, especially when we remember that it is always open to a plaintiff to apply for leave to issue execution—a course which would not prejudice him, and would relieve the sheriff from unnecessary risk.

BRAMWELL, B. I am of the same opinion; and I do not come to this conclusion simply upon authority. In my judgment the authorities cited to us were right. The writ of ca. sa. states the day on which judgment was entered up, and the certificate shews the date of registration. It therefore appeared in this case that the deed could in point of time have been pleaded in bar. But supposing a deed not to be pleadable, because it contains no release, or for some other reason, I am strongly of opinion that it would be no protection against execution; and on this point I would take leave to refer to my own judgment in *Staffordshire Banking Company* v. *Emmott* (1), and to s. 198 of the Bankruptcy Act, 1861. It is remarkable that there is no clause in the act expressly giving power to plead deeds. They are left to their common law effect, and when they contain a release are pleadable. If they do not contain a release they are not pleadable, and I do not see that they are in that case necessarily a bar to execution. The statute puts all the creditors on an equality, and I see no reason why the assenting creditors should be taken to agree that the debtor is to be free from the execution of a writ against his person or goods, unless he chooses to ask for that protection, and the deed is framed accordingly. The 198th section says that the certificate is to be available for all purposes as a protection in bankruptcy. I think this section means, that if a judgment be obtained, and then a deed is made, execution is not to issue. But in other respects it proposes to leave the debtor in the same situation as in an action at the suit of an assenting creditor, where the action would go on unless the deed were pleaded, and the deed would be no bar against execution. I do not see why, if this be so, the same consequence should not follow when the deed is not pleadable. In this case, therefore, I think the defendants ought to

(1) Law Rep. 2 Ex. at p. 218.

have arrested the debtor, and that the plaintiffs are entitled to our judgment.

1869

GODWIN v. STONE.

CHANNELL, B. I am of the same opinion. It is unnecessary to decide here whether there is a distinction with regard to the power to issue execution between deeds which are not pleaded and those which are not pleadable. Here the deed is alleged to have contained a release, and was pleadable. This being so, I think the authorities cited dispose of the question.

CLEASBY, B. On the authorities as they stand, the question before us, though difficult, is not doubtful. I agree that our judgment must be for the plaintiffs.

Judgment for the plaintiffs.

Attorney for plaintiffs: *William Hunt.*
Attorneys for defendants: *Burchell & Hall.*

MAYOR, ALDERMEN, AND BURGESSES OF DORCHESTER *v.* ENSOR AND ANOTHER.

June 10.

Market—Disturbance of Market—Municipal Corporations Act (5 & 6 *Wm.* 4, *c.* 76), *s.* 8—*Limits of Borough.*

In boroughs, the limits of which for the purposes of parliamentary representation have been fixed by 2 & 3 Wm. 4, c. 64, s. 35, sched. O., and which are included in the 1st section of schedules A. & B. to the Municipal Corporations Act (5 & 6 Wm. 4, c. 76, s. 7), all places within the limits so fixed, are by s. 8 of the latter act, parts of the borough for all purposes; and an ancient borough market may be lawfully held within such limits, although outside the limits of the old municipal borough.

A market held in the same town with an old market, if held upon the same day, is a disturbance by intendment of law; but if it is held on a different day it is only evidence of disturbance for the jury.

To support an action for disturbance of a market, it is not necessary that the defendant should have actually sold; any active interference by him in the conduct of the new market, or participation in its profits or risk, is sufficient.

ACTION for a disturbance of the plaintiffs' markets and fairs, tried before Channell, B., at Dorchester, at the summer assizes, 1868.

By usage previous to the reign of Edward III., and by a grant of

1869

MAYOR, &C., OF DORCHESTER v. ENSOR.

that reign confirmed by a charter of Charles I., the plaintiffs had a right to hold their markets every week on Wednesday, Friday, and Saturday. The Friday market had been disused, but a small market was held every Wednesday and Saturday, and a great market was held every alternate Saturday, for sheep, horses, and cattle.

Until the passing of the Municipal Corporations Act (5 & 6 Wm. 4, c. 76), the markets were held within the old municipal borough. The limits of the borough were, however, enlarged by 2 & 3 Wm. 4, c. 64, s. 35, sched. O. (10), for the purposes of parliamentary representation, and the Municipal Corporations Act (5 & 6 Wm. 4, c. 76), enacted (by s. 7) that "after the passing of this act the metes and bounds of the several boroughs named in the 1st section of the said schedules A. and B. [among which Dorchester was included], for the purposes of this act, shall be the same as the limits thereof respectively settled and described in 2 & 3 Wm. 4, c. 64;" and, by s. 8, that "every place and precinct which shall be included within the metes and bounds of any borough as hereinbefore provided, and none other, shall be part of such borough." After this latter act the market was held outside the old limits of the municipal borough, but within the extended limits fixed by 2 & 3 Wm. 4, c. 64.

The disturbance complained of was a sheep and cattle auction, conducted by the defendant Ensor in a neighbouring field, which was alleged to belong to the other defendant Manfield, and to be either let by him for the purpose, or jointly occupied for that purpose by the two co-defendants; and evidence was given of Manfield's active co-operation at the sales held there. These sales were held on Saturdays, but not on the same Saturdays on which the plaintiffs held their great market for sheep and cattle.

A verdict was entered for the plaintiffs, with leave to the defendants to move to enter a verdict for them, if there was no evidence of the plaintiffs' right to the market, or if there was no evidence of a disturbance by the defendants, or for either of the defendants against whom there was no such evidence. A rule having been obtained accordingly,

Jan. 19. *Mellish, Q.C.*, *Kingdon, Q.C.*, and *Lopes*, for the plain-

tiffs, shewed cause, and cited Fitzherbert Nat. Brev. 184 n. (b) *Yard* v. *Ford* (1), and Black. Com. iii. p. 219.

Cole, Q.C. and *M. Bere*, for the defendants, supported the rule, and cited *Mayor of Brecon* v. *Edwards* (2), Com. Dig. Market F. (1); *Bailiffs of Tewkesbury* v. *Diston* (3); *Bailiffs of Tewkesbury* v. *Bricknell* (4); *Wiltshire* v. *Willett* (5), and to shew that the question of disturbance was for the jury, *Yard* v. *Ford.* (6)

The pleadings, facts, and arguments of the case, are fully stated in the judgment.

Cur. adv. vult.

June 10. The judgment of the Court (Channell, Pigott, and Cleasby, BB.), was delivered by

CHANNELL, B. This was an action tried before me at Dorchester at the last summer assizes. A verdict was entered for the plaintiffs for nominal damages under my direction, the defendants having leave to move to enter the verdict for them or either of them. A rule was obtained pursuant to that leave, and was argued in Hilary Term before my Brothers Pigott and Cleasby and myself. We took time to consider our judgment, and having done so, we are of opinion that the verdict entered for the plaintiffs at the trial cannot stand; also, that the rule obtained by the defendants to enter a verdict for them ought not to be made absolute, but that, for the reasons hereafter stated, the defendants, if they desire it, are entitled to a new trial. This would be sufficient for the disposal of the rule now pending. The rule to enter the verdict for the defendants did not, as it ought to have done, specify the grounds on which that verdict was claimed; but, on the rule being called on for argument, it was agreed that all points open to the defendants on my notes should be raised, and the rule was argued on that footing. As we have already stated, we think there ought to be a new trial. Still, as on the argument of the rule questions were discussed which may arise again if a second trial takes place, it may be an assistance to the parties, and may possibly prevent the necessity for a second trial, if we state the opinion we have formed

(1) 2 Wm. Saund. at p. 174.
(2) 1 H. & C. 51; 31 L. J. (Ex.) 368.
(3) 6 East, 438.
(4) 2 Taunt. 120.
(5) 31 L. J. (M.C.) 8.
(6) 2 Wm. Saund. 172.

1869

MAYOR, &c. OF DORCHESTER v. ENSOR.

on the various points, although in the result they do not affect our present judgment that there ought to be, if the defendants desire it, a new trial.

The declaration contained four counts, in two of which the plaintiffs allege that they were possessed of a market in the borough of Dorchester, and that the defendants disturbed that market by holding, as alleged in the first count, a new market, and by exposing goods, &c., for sale near the plaintiffs' market, as alleged in the second count.

The other two counts complained of similar disturbances of the right, which the plaintiffs allege they had, of holding four fairs in the year. The defendants pleaded not guilty, and also traversed that the plaintiffs were possessed of the market and entitled to hold the fairs.

At the trial the plaintiffs put in evidence a writ ad quod damnum of the date of 11 Edward III., and the inquisition returned by the sheriff to that writ, by which it appeared that the profits of the borough of Dorchester at that time included three fairs on certain named feast days, and also three markets every week, on Wednesdays, Fridays, and Saturdays. There was also put in a grant of Edward III., founded on that inquisition, by which those franchises and customs were granted and confirmed to the mayor and burgesses of Dorchester in fee farm for ever at a rent of 20*l*. It was proved that this rent was paid at the present time. There was also a charter of Charles I. put in, confirming the privileges of the corporation.

We think there was abundant evidence of the right originally to three markets in the week, and to at least three fairs in the year. As to the fourth fair, that which the corporation claim to hold on the 14th of February, evidence of the actual holding of the fair for a considerable time was given, which was, we think, sufficient to shew the existence of the right to that also. Inasmuch, however, as we think there was no evidence of disturbance of the fairs, it is not necessary to go further into the question of the right to the fairs.

As regards the holding of the markets, the evidence shewed that no market had been held in modern times on Friday. On every Wednesday and Saturday it appeared that there was a

small market held for the sale of some articles; but the important question in this cause arises as to the market for sheep, horses, and cattle, and as to that, it appears that the practice for many years has been to hold for that purpose what is called a "great market" once a fortnight. For many years the cattle market has been held on every alternate Saturday. The object of this appeared to be the convenience of persons frequenting the market, and there was some evidence to shew that the market ground had usually been open every Saturday to persons who chose to bring cattle there for sale. It by no means appears, therefore, that the corporation have lost their right to hold a cattle market every Saturday, or indeed every Wednesday, if they chose to do so. But however that may be, the plaintiffs can only recover in this action for disturbance of markets which they actually held, and they only appear to have held cattle markets on alternate Saturdays. As, however, that is one of the days on which the markets granted were originally held, and, so far as appears upon the evidence, the cattle markets have constantly been held, and always on one of those days, we are of opinion that they are rightfully held, so far as the day is concerned.

A further question was raised as to the place in which the market was held. It was conceded on both sides that the market might be held on any part of the ancient borough. The market field, however, in which the market has been held since shortly after the passing of the Municipal Corporations Act, is without the ancient borough, but within the limits of the parliamentary borough, to which—for some purposes, at all events—the ancient borough was enlarged. The question is whether, upon the passing of that act, the corporation became entitled to hold their ancient market anywhere within the limits of the borough as enlarged, and that, of course, depends on the words of the act.

The sections principally in question are the 7th and 8th. The 7th section says that the metes and bounds of certain boroughs (amongst them Dorchester) "for the purposes of this act shall be" those of the parliamentary borough. The 8th section says, that "every place and precinct which shall be included within the bounds of any borough, as thereinbefore provided, and none other, shall be part of such borough, and in those boroughs which are

1869

MAYOR, &c. OF DORCHESTER v. ENSOR.

counties in themselves shall be part of such county, and of none other." In this section, the 8th, the words "for the purposes of this act" are not used. It appears, indeed, from a note in Rawlinson's Municipal Corporation Acts, p. 14, n. (1), and also in Chitty's Statutes, vol. i. p. 962 (*e*), that some of the copies of the act printed by the King's printer had the words in this 8th section also, but that they are not in the parliament roll. As the words are not now found in any of the copies printed since attention was drawn to the point, there can be no doubt that this latter statement is correct; probably the words were in the bill, but were struck out before it passed. That, of course, cannot affect the construction of the act as it stands, but it increases the probability, in fact, that the omission of the words was intentional, and therefore justifies us in giving effect to the difference in language in the two sections, which otherwise might have been thought so slight as to be immaterial.

Now, what is the effect of the two sections taken together? Sect. 7 says, that "for the purposes of the act" (within which s. 8 would apparently be included) the boundaries should be so and so. Then s. 8 says that all places within the boundaries defined by s. 7 shall be parts of the borough, without any restriction as to their being so for the purposes of the act only. There can be no doubt that the main object of s. 8 was rather to cause the localities attached by the act to boroughs or counties to cease to form part of those to which they had before belonged; but if the language by which this is effected is sufficient to attach them to the boroughs for general purposes more extensive than those as to which s. 7 applied, there is no reason why we should not give effect to that language.

It is true that in *Beadsworth* v. *Torkington* (1) it is said by the Court that they find no provision in the act sufficient to add these places to the boroughs for all intents and purposes. But it must be remembered that that case was a very different one from the present. If it had been held that the additional parish had been attached to the borough of Stamford, for the purpose of entitling

(1) 1 Q. B. 782, at p. 791; the effect of a contrary decision would have been to throw an additional burden upon the lands in which a right of common was claimed.

the inhabitants within it to the rights which the inhabitants in the old borough had by prescription, the result would have clearly been to disregard the policy of the 2nd section of the act, by which ancient rights are reserved only to those persons who would be entitled to them but for the passing of the act. That case is rather like what the present would be, if the market had been moved before the boundaries were enlarged.

It appears to us that the corporation, being at the passing of the Municipal Corporations Act entitled to hold a market at any place within the jurisdiction of their governing body, became upon the passing of that act entitled to hold it within any part of the district to which that jurisdiction was enlarged; and that there is nothing in the wording of the 7th section which obliges us to hold that the corporation, by holding the market within the part added to the borough, have forfeited their ancient right. It must be remembered that no rights would be affected by the jurisdiction being enlarged for this purpose. It would not cause any acts to be disturbances of the market which would not have been so before, for a market in a borough may be disturbed by holding another market near, whether the new market so held be within or without the borough. The moving of the market could only be prompted, as undoubtedly it was in the present case, by considerations of convenience.

It was contended that, if there had been a disturbance at all, it was not a disturbance by both defendants jointly. Now the evidence shewed that the defendant Ensor was an auctioneer, who at one time sold cattle by auction, under the authority of the corporation, at their market (1), but that latterly he had held, at another place close by, a fortnighly sale of cattle by auction, which appeared to have been regularly advertised. There can be no question that this is substantially another market, and that it differs very much from the case of a man selling his own goods out of the

(1) The circumstances were as follows: Formerly the defendant Ensor had conducted a market on alternate Saturdays in the plaintiffs' market ground, and paid the usual toll. Complaint was made that the market should be thrown open on those days to the public; and on its being opened, the defendant held, on the intermediate Saturdays during the months of October and November, the auction complained of in the defendant Manfield's field.

1869

MAYOR, &C. OF DORCHESTER v. ENSOR.

market, which may or may not be a wrongful disturbance, according to the circumstances. The cases, therefore, as to the right of persons in some boroughs, where there is an ancient market to sell marketable goods on their own premises and the like, do not, we think, apply; because what is complained of is, not that the defendants sell their own goods, but that they provide a means for others to sell their goods without bringing them to the market. Then as to the part taken by the other defendant. It appears that Ensor, who actually conducts the sale, does so in a place which was called Mr. Manfield's field. There was no legal proof that the field belonged to the defendant Manfield. It appears, however, that he was present on some occasions when the sales were going on, and that he said the field was his private field, and asserted his right to turn off a police constable who was counting the sheep which were being sold. He also served a notice on the collector of tolls for the borough not to trespass on any land belonging to him, "the same being in the joint occupation of himself and Ensor." It was contended that, although the particular place was not specified, yet, as there was no other land which there was any pretence for saying was in the joint occupation of the two defendants, this notice amounted to an admission that Manfield was responsible for what was done on this field. Now it is not necessary, in order to fix a defendant with disturbing a market, that he should have actually sold. It would almost appear, from what was said in *Mosley* v. *Chadwick* (1), that merely receiving rent out of the land used for the market from the persons using it would be sufficient, and, at any rate, receiving rent in the nature of stallage, or any increased rent, in consequence of the use to which the land is put, above that which otherwise would be obtainable, would be sufficient. We think that the interference proved on the part of Manfield amounted to evidence to go to the jury that both these defendants were taking part in carrying on the fortnightly sales.

It remains only to consider the further fact that the sales were not held on the same Saturdays as the plaintiffs held their cattle market. The defendants, on the argument of the rule, contended that, on this ground, there was no disturbance. At the trial it appeared to me that the points which Mr. Cole desired to raise on

(1) 7 B & C. 47, note.

behalf of the defendants were sufficiently open to him upon the plaintiffs' case, and it was rather at my suggestion that the case proceeded no further. I gave leave to move upon these points, and expressed my desire so to reserve them that everything should be before the Court. I find, however, from my notes, that the form in which I reserved the questions was: "Leave to move to enter a verdict for the defendants on the counts claiming a right to hold the markets, if no evidence to go to the jury in support of these counts, and the like leave as to the counts claiming a right to hold the fairs. Also to enter a verdict for the defendants, if no evidence to go to a jury of a disturbance of the fair or market, or for the defendant, against whom there was no evidence of a disturbance."

I, however, ruled, as a point of law, that the defendants, if otherwise guilty of a disturbance, would be so guilty, though the disturbance was not on the day on which the plaintiffs were entitled to hold, and held, their market, but on a day shortly after. According to the view which, upon a more careful consideration of the case than I could give to it at nisi prius, I now entertain, my direction, though not incorrect as far as it goes, is not sufficient for the decision of this case.

We take the law to be as laid down in the notes to *Yard* v. *Ford* (1), that is, that where a new market is held on the same day as the old it shall be intended to be a nuisance; that where it is on a different day it shall be put in issue whether it be a nuisance or not. It was not, however, suggested to me that the true view in such a case was that it was a question of fact to be left to the jury, whether the old market was injuriously affected or not. The contention was, that the defendants were not liable unless the disturbance was on the same day. If my attention had been drawn to it, I think that what was the object of all parties, viz., to bring the matter fully before the Court, would have been carried out, by expressly reserving to the Court a power to draw inferences. If that had been done, we should have been prepared to draw the inference that some of the very large number of sheep and cattle sold at the defendants' sale would, if those sales had not been held, have been sold at the plaintiffs' market. This would, upon the authorities, clearly support the verdict for the plaintiffs. But the

(1) 2 Wm. Saund. at p. 174.

1869

MAYOR, &c. OF DORCHESTER v. ENSOR.

power to draw inferences was not, however, expressly given to the Court.

Leave was given to enter a verdict, if there was no evidence to go to the jury. We are of opinion not only that there was evidence to go to the jury, but sufficient evidence to support a verdict for the plaintiffs, and upon which that verdict ought to have been found. The rule to enter the verdict cannot, therefore, be made absolute, but as my direction appears not to have been accurate, the defendants are entitled to a new trial. (1) It is to be hoped, however, that, after the opinion we have expressed, the parties may come to an arrangement which may avoid the necessity of further litigation. Of course the opinion we have formed, so far as questions of fact are concerned, might be altered by evidence at a second trial; yet, in order to prevent misapprehension, we think we ought to say that, unless the facts are substantially altered, a verdict for the defendants would be wrong. We cannot, however, see that we are authorized to draw such inferences as a jury might draw, and, on that ground, we are obliged to direct a new trial.

Rule discharged and new trial directed. (2)

Attorneys for plaintiffs: *Dangerfield & Co., for Symonds, Dorchester.*

Attorneys for defendants: *Rhodes, Son, & Duffet, for Andrews & Cockeram, Dorchester.*

(1) It is to be observed that no rule on the ground of misdirection had been applied for, the defendants' counsel having at the trial consented to take the learned judge's ruling with the leave reserved, and not to go to the jury.

(2) The cause came on for trial again at the Dorsetshire summer assizes, 1869, and the defendants consented to a verdict for 400*l.*, and an agreed sum for costs. *Kingdon, Q.C., Lopes, Q.C.*, and *Bowen*, appeared for the plaintiffs; *Bere, Q.C.*, for the defendants.

IN THE MATTER OF DE LANCEY'S SUCCESSION.

1869
July 2.

Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51)—*Legacy Duty Act* (36 *Geo.* 3, *c.* 52)—55 *Geo.* 3, *c.* 184—*Money to be laid out in Land—Conversion—Practice.*

By a will, dated in November, 1799, J. De L. gave to trustees 10,000*l.* consols, and certain other sums, upon trust that they should lay out both principal and interest in the purchase of land, to be conveyed to the use of Charles De L., his eldest son, for life; remainder to trustees, to preserve, &c.; remainder to the first and other sons of Charles De L. and the heirs male of their bodies successively in tail male, and in default of such issue to the use of James De L., another son of the testator, for life, with similar remainders; remainder to the testator's own right heirs.

The testator died on the 8th of April, 1800, leaving his two sons, Charles and James, and one daughter, Susanna, him surviving. The moneys directed to be laid out in land were never so laid out, and Charles during his life received the dividends upon the whole "real estate fund." In 1840 he died a bachelor and intestate, whereupon the dividends were paid to James up to May, 1857, when he also died a bachelor and intestate. Susanna De L. then became the only lineal descendant and heir at law of the testator. She died in April, 1866, unmarried and intestate, having refused during her lifetime to receive either dividends or principal of the money left under her father's will. Shortly afterwards, the "real estate fund" was paid into the Court of Chancery in an administration suit, and eventually was directed to be paid out to the petitioner, who was a grandson of a brother of the testator, and heir at law of Susanna De L.

The Commissioners of Inland Revenue required the petitioner to pay succession duty on the "real estate fund" at the rate of 5 per cent. under the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 10, on the ground of the same being a succession to him derived from Susanna De L., as the "predecessor." On appeal against this assessment:—

Held, per Kelly, C.B., and Channell, B., that duty was not payable under the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), but under the Legacy Duty Act (36 Geo. 2, c. 52).

Per Bramwell and Cleasby, BB., that duty was payable under the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), as on a succession from Susanna De L., as the "predecessor."

Semble, per Bramwell, B., under whichever Act duty was payable, the amount charged by the commissioners was correct, Charles De L., James De L., and Susanna De L., having all died after 55 Geo. 3, c. 184, came into force.

Per Kelly, C.B. The doctrine of the court of equity, that money directed to be laid out in land is land, does not extend to the interpretation of statutes imposing duties on personal estate.

THIS was a petition of appeal under the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 50, presented by Edward Floyd De Lancey, a legatee of, or successor to, personal estate, directed to be

1869

IN RE DE LANCEY.

laid out in the purchase of real estate under the will of James De Lancey, of Bath, deceased.

James De Lancey, by his will, dated the 15th of November, 1799, bequeathed to trustees a fund, consisting of a sum of 10,000*l.* consols, and of certain other securities, upon trust that they should lay out both principal and interest therefrom arising in the purchase of land, and convey the same to the uses following: that is to say, to the use of his eldest son, Charles Stephen De Lancey, for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of Charles Stephen De Lancey and the heirs male of their bodies successively in tail male; and in default of such issue, to the use of the testator's son James De Lancey for life, with similar remainders; and in default of such issue, then to his own right heirs.

James De Lancey died on the 8th of April, 1800, leaving two sons, namely, the above-mentioned Charles Stephen, and James, and a daughter named Susanna. The fund directed to be laid out in land was never actually so laid out, but Charles Stephen received the dividends arising from it down to May, 1840, when he died a bachelor and intestate. The dividends were thenceforward paid to James until May, 1857, when he died also a bachelor and intestate. Susanna thus became the only lineal descendant and heir at law of the testator. She died, single and intestate, in April, 1866; but, during the interval between James's death and her own, she had declined to receive either dividends or principal of the moneys left under her father's will. Shortly afterwards the real estate fund, with the accumulated dividends, was paid into the Court of Chancery in an administration suit, and eventually, after the usual inquiries and accounts had been made and taken, was paid (except the dividends which would have been paid to Susanna De Lancey if she had thought proper, and which were now directed to be paid to her personal representative), by order of the Lords Justices of Appeal, to the petitioner Edward Floyd De Lancey, who was grandson of a brother of the testator, and heir at law of Susanna, of Charles Stephen, of James, and of the testator.

The Inland Revenue Commissioners made an assessment, whereby the petitioner was required to pay succession duty on the real estate

fund, at the rate of 5 per cent., on the ground of the same being a succession to him derived from Susanna De Lancey as his "predecessor." Against this assessment the petitioner gave notice of appeal on two grounds: 1st, that legacy and not succession duty was payable by him in respect of the real estate fund, and that such duty was properly payable by him as being a descendant of the brother of the deceased James De Lancey, the testator, at the rate of $2\frac{1}{2}$ per cent., under 36 Geo. 3, c. 52; or, 2ndly, that if succession duty was payable, the proper rate was 3, not 5 per cent., inasmuch as the real estate fund was a succession derived by the petitioner, not from Susanna De Lancey, but from James De Lancey, the testator, the "predecessor;" and the petitioner prayed that the assessment might be altered, so far as the same made him liable to a duty of 5 per cent.

The 36 Geo. 3, c. 52, s. 19, enacts that "any sum of money or personal estate directed to be applied in the purchase of real estate shall be charged with and pay duty as personal estate, unless the same shall be so given as to be enjoyed by different persons in succession, and then each person entitled thereto in succession shall pay duty for the same in the same manner as if the same had not been directed to be applied in the purchase of real estate, unless the same shall have been actually applied in the purchase of real estate before such duty accrued; but no duty shall accrue in respect thereof after the same shall have been actually applied in the purchase of real estate, for so much thereof as shall have been so applied; provided nevertheless that, in case before the same, or some part thereof, shall be actually so applied, any person or persons shall become entitled to an estate of inheritance in possession in the real estate to be purchased therewith, or with so much thereof as shall not have been applied in the purchase of real estate, the same duty which ought to be paid by such person or persons, if absolutely entitled thereto as personal estate by virtue of any bequest thereof as such, shall be charged on such person or persons, and raised and paid out of the fund remaining to be applied in such purchase."

The 55 Geo. 3, c. 184, sch., in some respects altered the quantum of legacy duty from that imposed by 36 Geo. 3, c. 52, s. 2, and imposed, so far as regarded persons dying before the 5th of April,

1869

IN RE DE LANCEY.

1805, a duty of 2½ per cent. where any legacy or residue shall have been given or have devolved to or for the benefit of a brother or sister of the deceased, or any descendant of a brother or sister. So far as regarded persons dying after the 5th of April, 1805, a duty of 3 per cent.; and "where any such legacy or residue shall have been given, or have devolved to, or for, the benefit of a brother or sister of the father or mother of the deceased, or any descendant of a brother or sister of the father or mother of the deceased," a duty of 5 per cent.

The 16 & 17 Vict. c. 51, s. 2, enacts that "every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to any property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person in possession or expectancy, shall be deemed to have conferred, or to confer, on the person entitled by reason of any such disposition, or devolution, a "succession;" and the term "successor" shall denote the person so entitled; and the term "predecessor" shall denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the succession is or shall be derived."

Section 10 provides, that brothers or sisters of the predecessor, and their descendants, shall pay a 3 per cent. duty; or brothers or sisters of the father or mother of the predecessor, and their descendants, a 5 per cent. duty.

Section 30 enacts that "the interest of any successor in personal property, subject to any trust for the investment thereof in the purchase of real property, to which the successor would be absolutely entitled, shall, so far as the same shall not be chargeable with duty under the Legacy Duty Acts, be chargeable with duty under this Act as personal property; and personal property subject to any trust for the investment thereof in the purchase of real property, to which the successor would not be absolutely entitled, shall, so far as the same shall not be chargeable with duty under the Legacy

Duty Acts, be chargeable with duty under this Act as real property; and for the purposes of this Act each successor's interest therein shall be considered to be of the value of an annuity payable during his life, or for any less period during which he shall be entitled, equal in amount to the annual produce of the actual trust property at the time of his becoming entitled in possession, whether the same shall be the real property directed to be purchased, or any intermediate investment of the personal property directed to be invested in such purchase."

June 4. *Sir J. B. Karslake, Q.C.* (*Townsend*, of the Chancery Bar, with him), for the petitioner. (1) Legacy, at the rate of 2½ per cent., and not succession duty, is payable by the petitioner. The money to which he is entitled was a "real estate fund," and as such was chargeable as personalty: 16 & 17 Vict. c. 51, ss. 18, 30; 36 Geo. 3, c. 52, s. 19. It was taken under the will of James De Lancey, the testator. In the absence of that will, the next of kin of Susanna De Lancey would have been entitled. But assuming succession and not legacy duty to be payable, the "predecessor" of the petitioner was the testator, and not, as the Crown suggests, Susanna De Lancey. And taking this view, the assessment cannot be maintained. The proper rate chargeable would be 3 and not 5 per cent. [He also referred to 3 & 4 Wm. 4, c. 106.]

Sir R. P. Collier, A. G. (*Crompton Hutton* with him), for the Crown. First. This is not a case of "legacy," because the property is not really taken under the testator's will, which was exhausted by the previous takers: Jarman on Wills, 3rd ed. vol. ii. p. 77. Susanna De Lancey took by descent from her brother, and not from the testator. The 36 Geo. 3, c. 52, s. 19, therefore, does not apply, for the words in that section "given to be enjoyed" mean "given to be enjoyed under the testator's will." Secondly. It is a case of "succession" by devolution. The claimant is entitled under Susanna De Lancey as "predecessor": *Lord Saltoun* v. *Lord Advocate-General;* (2) and the rate charged is therefore correct under the 16 & 17 Vict. c. 51, s. 10.

[CLEASBY, B., referred to *East* v. *Twyford.* (3)]

(1) As to the right to begin, see ante, p. 327.

(2) 3 Macq. 659.

(3) 9 Hare, 713, 730, n.

1869

IN RE DE LANCEY.

Sir J. B. Karslake, Q.C., in reply, cited *Hayford* v. *Benlows* (1), and *Tregonwell* v. *Lord Sydenham.* (2)

The Attorney-General was heard in rejoinder.

Cur. adv. vult.

July 2. The following judgments were delivered:—

CLEASBY, B. In this case the petitioner, Edward Floyd De Lancey, succeeded as heir at law of one Susanna De Lancey to a large sum of money which had, by the will of one James De Lancey, dated the 15th of November, 1799, been directed to be laid out in land, and to which the said Susanna De Lancey had, under the provisions of that will, become absolutely entitled.

The question is, with what succession duty, if any, the petitioner is chargeable under 16 & 17 Vict. c. 51. In the view which I take of the case the particular limitations of the will are not of importance. It is sufficient to say that the testator bequeathed 10,000*l.* consols, and all moneys due to him at his death, upon certain securities, to trustees upon trust to lay out the same and interest thereupon in the purchase of lands, and directed the lands to be conveyed and settled to the use of his eldest son, Charles Stephen, for life, with remainder to the first and other sons of Charles Stephen successively in tail male, and in default of issue to his son James for life, with remainder to the first and other sons of James successively in tail male, and in default of such issue then to his own right heirs.

The money was not, in fact, laid out in land by the trustees, and Charles Stephen De Lancey died a bachelor and intestate in 1840, having received the dividends during his life.

James De Lancey survived, and also received the dividends during his life, and died a bachelor and intestate in 1857.

Susanna De Lancey was the only surviving lineal descendant of the testator, and, upon the death of James, became absolutely entitled to the fund, but she refused to receive any part of the principal or interest. No act was done at any time to prevent the fund from being impressed with the character of land given to it by the will, and there is no question that upon the death of

(1) Amb. 581. (2) Dow. H. L. 194, 207.

Susanna it descended, as land would descend, to the petitioner, her heir at law. If this fund had been really land, then, as Susanna was absolutely entitled or seised in fee, it would not matter how she became so, and the succession to the petitioner would be by devolution, and not by disposition. That being so, I adopt the rule laid down by Lord Campbell in the case of *Lord Saltoun* v. *The Advocate-General.* (1) His words at page 673 are: "This object, I think, will best be obtained by holding that when the succession is by disposition the settlor is the predecessor, and where by devolution the last possessor is the predecessor." So that in the present case Susanna would be the predecessor, and the duty, as upon a succession from her, 5 per cent.

But it was strongly urged at the bar on behalf of the petitioner that though this might have been the case if the fund had been actually land, yet as it was actually money, and only land by the operation and effect of the will of the testator, the above rule cannot properly be applied. The concluding words of s. 2 of the Succession Duty Act were referred to, by which the predecessor is to denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived, and it was said that the interest of the successor, as heir at law to the fund in question, was necessarily derived from the testator who had impressed the fund with the character of land, and so made it go to the petitioner as heir at law. This argument, though well deserving of attention, is not sufficient to satisfy me that the interest of the petitioner is derived from any other person but Susanna, who was absolutely entitled to the fund, and whom the petitioner succeeded as heir-at-law, and, when well examined, is open to the objection that it confounds together two things which are properly distinct, viz., the person from whom the interest is immediately derived, and the person who remotely caused it to be so derived. In the present case the whole interest is derived from Susanna. No one would say it was partly derived from her, and partly from the testator; still less that it was wholly derived from the testator, since Susanna might have at any time changed its character, and prevented it from descending as it did, or have disposed of it in any manner she thought proper.

(1) 3 Macq. 659.

1869

IN RE DE LANCEY.

Supposing, then, that the succession duty is payable, I am of opinion that it is payable, as upon a succession, from Susanna; that is, at the rate of 5 per cent. But it was also argued on behalf of the petitioner that he was not liable to succession duty at all, because he was properly liable for legacy duty in respect of the property which he had succeeded to as heir of Susanna, and by the 18th section of the Succession Duty Act, 1853, there was no liability for succession duty when there was a liability under Legacy Duty Acts. I should have thought it a sufficient answer to this argument that the succession of the petitioner was a succession to real estate as heir at law, and not to personal estate through the executor or administrator; that Susanna died entitled to real estate, and not personal estate; that the fund in question throughout the case was called real estate, and not personal estate; and that the Legacy Duty Acts only apply in terms, and can only apply to personal estate.

But as I understand two of my learned Brothers are of a different opinion, I am probably mistaken in supposing the above reasons to be sufficient, and it is necessary to examine the matter a little more fully. The testator, by his will, disposed of personal estate, and that personal estate ought, of course, to pay legacy duty through all the limitations. Charles Stephen was therefore liable to legacy duty in respect of his life estate, as what he took was part of the personal estate of the testator, and in like manner James, and afterwards Susanna, who then became absolutely entitled. But as soon as she became absolutely entitled it became her real estate absolutely, and the will, of course, would operate no further.

Ever since the case of *Fletcher* v. *Ashburner* (1) it has been considered that, after the direction in a will to trustees to apply money in the purchase of land, the money in the hands of the trustees is, for all purposes, regarded as land. It was said there by Sir Thomas Sewell, M.R. (2), that the cases established universally that a man may in this and the converse case "make land money, and money land," and this, as a correct statement of the law, has been repeated and upheld: see *Wheldale* v. *Partridge*. (3) The money becomes impressed with the character of land so completely

(1) 1 Bro. C. C. 497. (2) 1 Bro. C. C. at p. 499.
(3) 8 Ves. at p. 235.

that it becomes subject to tenancy by the curtesy: *Sweetapple* v. *Bindon* (1); and was not until the passing of 3 & 4 Wm. 4, c. 104, liable to simple contract debts of the devisee, though it would be bound as real assets by a judgment: *Frederick* v. *Aynscombe*. (2) That being so, the fund, being stamped with the character of realty, descends to the heir without the intervention of an executor or administrator, and there can hardly, as it appears to me, be a question that but for the 19th section of 36 Geo. 3, c. 52, no legacy duty would be payable. But it is contended that under that section the fund is always liable to legacy duty until it is actually laid out in land. If, however, that section is examined, it will, I think, appear that it can have no such effect. That section fixes the legacy duty payable in respect of the personal estate of a testator who directs it to be laid out in land. It provides that so long as the fund is administered and distributed as the personal estate of the testator it shall pay legacy duty. The persons who take successive interests in it would therefore have to pay legacy duty, and the ultimate devisee who became absolutely entitled would pay legacy duty, but as soon as it has vested in him the will of the testator has no longer any operation, and it becomes his real estate, and descends to his heir at law or devisee. There is, in fact, no executor or administrator to make any return of the person or persons entitled to this real estate, or of the scale upon which legacy duty would be payable except under the Succession Duty Act.

It must be borne in mind that although the effect of the will is to convert the money into land, and so make it in the hands of the devisee real estate, yet it was at the death of the testator, his personal estate, and so continued until the will was fully administered, although the clause in question after the money or any part of it has been actually laid out in land exempts it pro tanto from the payment of legacy duty so far as regards the devisees subsequently taking it under the will.

One argument resorted to on behalf of the petitioner was that unless the fund continued always liable to legacy duty until actually laid out in land, a testator would have the power by such a direction to exempt his estate for all time from legacy duty. But we

(1) 2 Vern. 536. (2) 1 Atk. 392.

1869

IN RE DE LANCEY.

have seen that so far as the limitations of his will extend the case is properly provided for, and except in the case of a minority and of the person entitled dying a minor, or of some eccentric person like Susanna De Lancey, who refused to take the interest or principal, as soon as a person becomes absolutely entitled, the fund would be handed over to him and so get home (as the phrase is), and resume the character of personal estate.

The case of a person becoming entitled to the fund under the will is provided for, but the case of the same person dying, entitled, as real estate, to what he took as personal estate, was not contemplated, and therefore was not provided for, and there was as far as I can see no machinery for getting the legacy duty or indeed of fixing the amount, as there is no executor or administrator to administer it.

It seems to me, therefore, that the duty is payable in this case under the Succession Duty Act and not under the Legacy Duty Act, and that the Crown is entitled to judgment at the rate of 5 per cent. My Brother Bramwell concurs in this judgment.

BRAMWELL, B. I am sorry that there should be a difference on the bench in this case, because I think it will be found that we all arrive at the same conclusion, only by different paths. The petitioner here prays that the assessment of the commissioners may be altered or varied so far as the same makes him liable to a duty of 5 per cent. Now, it strikes me that on the view which I know is taken by my Lord Chief Baron and my Brother Channell, the petitioner will be liable to a duty of 5 per cent. as upon an intestacy of the person under whom he took. However, I myself think that s. 19 of 36 Geo. 3, c. 52, is not applicable. It begins by saying, "Any sum of money or personal estate directed to be applied to the purchase of real estate shall be charged and pay duty as personal estate." If the enactment stood there, it seems manifest that the same money so applied would pay duty once for all, but it goes on and says, "unless it shall be so given as to be enjoyed by different persons in succession, and then each person entitled thereto in succession, shall pay duty for the same in the same manner as if the same had not been directed to be applied in the purchase of real estate." And then it proceeds, "Provided, never-

theless, that in case before the same or some part thereof shall be actually so applied, any person or persons shall become entitled to an estate of inheritance in possession in the real estate to be purchased therewith, or with so much thereof as shall not have been applied in the purchase of real estate, the same duty which ought to be paid by such person or persons, if absolutely entitled thereto as personal estate, by virtue of any bequest thereof as such, shall be charged." Therefore, it seems to me the scheme of the Act is this; the money so left shall pay legacy duty, and if there are life interests in it short of an estate of inheritance, the legatees shall pay in respect of such interests, and when there comes to be an estate of inheritance then the duty shall be paid as if there had been no such life interests interposed. But it seems to me that duty on the estate of inheritance is to be paid once and once only, and is not to be paid toties quoties. Indeed, I think impossible it can be so, because, suppose money is left to be laid out to purchase an estate for the benefit of a stranger in blood of the testator, and that man dies before the money is laid out, his son would then take, but surely it cannot be intended that that son should pay duty as a stranger in blood of the testator. What, in truth, he ought to pay, would be under the will of his father if the father had left a will, or as next of kin of the father if the father had not left a will. It seems to me, therefore, that s. 19 of 36 Geo. 3, c. 52, or the latter part of it, cannot be read as though the words *toties quoties* were there; in other words, it cannot be read to mean that so often as there is an estate of inheritance in the money, such money shall pay as upon a legacy left by the original testator. But I understand the Lord Chief Baron and my Brother Channell to be of opinion that at all events, the money, inasmuch as it remained in the condition of money de facto, must have paid on the death of the person entitled to the estate of inheritance, in some sense, a new duty. If that be so, then in this case the money would pay the duty as upon an intestacy, either of Susanna or an intestacy of one of her two brothers. But all those three died after the coming into force of 55 Geo. 3, c. 184, which regulates the present amount of legacy duty and duty on an intestate's estate, and under that statute will be found that 5 per cent. would be payable. If, therefore, this sum of money is subject to a legacy

1869

IN RE DE LANCEY.

duty or to a duty as upon an intestacy, it is as upon the intestacy of Susanna or one of her brothers; and then the rate of duty is 5 per cent. On the other hand, if it is subject to a succession duty, then it appears to me for the reasons given by my Brother Cleasby it is also subject to a duty of 5 per cent. Therefore, whether we treat this as a sum of money liable to a duty as a portion of an intestate's estate, under the Legacy Duty Acts, or whether we treat it as a sum of money, subject to the Succession Duty Act, 1853, we must in either case say that it is subject to a duty of 5 per cent., and that, therefore, the prayer of the petitioner must be refused.

KELLY, C.B. The first question raised in this case is whether the money to which the petitioner has become entitled upon the death of Susanna, the daughter of the testator, is liable under the Succession Duty Act at all. By the 30th section of that Act (16 & 17 Vict. c. 51), the interest of any successor in personal property, subject to any trust for investment thereof in the purchase of real property to which the successor would be absolutely entitled, is made chargeable with duty under that Act as personal property, but so far only as it is not chargeable with duty under the Legacy Duty Acts. We must, therefore, consider whether this money is liable to duty under the Legacy Duty Act, 36 Geo. 3, c. 52. By the 1st section of this statute, the duty is imposed upon the clear residue of the personal estate when devolving on one person, where the title to such residue shall accrue by virtue of any testamentary disposition, or upon a partial or total intestacy. This money then devolving upon the petitioner, either by the testamentary disposition of the testator, or upon the intestacy of his daughter, would be liable to the duty unless it be exempt by reason of the direction to lay it out in land, and by the 19th section the duty attaches by express enactment upon money directed to be so applied. The question, therefore, is whether this section imposes the duty upon the money to which the petitioner is entitled in the present case. Now the enactment is that "any sum of money or personal estate directed to be applied in the purchase of real estate, shall be charged with and pay duty as personal estate." If it stopped here it is clear that it would charge all money to whose hands soever it might come, and under whatever circumstances directed to be so applied. But

1869

IN RE DE LANCEY.

it proceeds, "unless the same shall be so given as to be enjoyed by different persons in succession, and then each person entitled thereto in succession shall pay duty for the same in the same manner as if the same had not been directed to be applied in the purchase of real estate" (unless it shall have been actually invested).

Now supposing this to apply to the bequest to the two sons only, as they alone take in succession under the limitations of the will, they would be liable under the 8th, 12th, and 13th sections to the duty imposed in respect of a temporary and limited, and not an absolute interest in personal estate. If, however, the words be extended to the daughter and the petitioner as taking in succession under the will in another sense, viz., by virtue of the provision in the will that the money is to be laid out in land, and so pass to the heir and not to the next of kin, it equally becomes liable to the duty upon personal estate under this Act. But if otherwise, and if the words apply only to the succession of the sons, we come next to the proviso that "in case before the money is actually laid out, any person or persons shall become entitled to an estate of inheritance in possession in the real estate to be purchased therewith, the same duty which ought to be paid by such person or persons if absolutely entitled thereto as personal estate by virtue of any bequest thereof shall be paid by such person or persons." I cannot ascribe any other meaning to these words than such as they naturally import, and that is that where money is given as here to be laid out in land, and any person or persons before it is actually so laid out, shall become entitled to an estate of inheritance in possession in the land to be purchased, he or they shall pay the same duty as ought to be paid by him or them, if absolutely entitled thereto as personal estate. The petitioner is strictly and literally within the words of this provision, for before the money is laid out in land, he has become entitled to an estate of inheritance in possession in the land to be purchased. Why then shall he not pay, in the express language of the Act, "the same duty which ought to be paid by such person if absolutely entitled thereto, as personal estate by virtue of any bequest thereof." It has been suggested that this proviso applies only to the first of several persons in succession becoming entitled to an estate of inheritance in

1869

IN RE DE LANCEY.

the land; but what is there to authorize this limited construction? The words are not "the first person or persons becoming entitled," but "any person or persons becoming entitled to an estate of inheritance." The petitioner is clearly a person becoming entitled to an estate of inheritance in the lands to be purchased, and comes therefore within the very words of the proviso. And why should it be otherwise? The legislature plainly intended to impose this duty upon all money directed to be laid out in land until it should actually be so laid out, and I am at a loss to imagine a reason why if, as has occurred in this case, two persons, of whom the petitioner is one, successively become entitled to an estate of inheritance in the land to be purchased, either of the two more than the other, should be exempted from the liability to this duty.

I think, therefore, the fund in question is clearly liable to duty under 36 Geo. 3, c. 52, and that therefore the succession duty does not attach; but I am by no means prepared to say that if this 19th section had been omitted altogether in the Act, the duty would not have been payable, by virtue of its general provisions, upon any money to be laid out in land, until actually so laid out. The doctrine that money to be laid out in land, is to be treated as land, though long established in courts of equity, is, in truth, a mere fiction, and no more; and founded upon what Lord Thurlow, in *Pulteney* v. *Earl of Darlington* (1), called "the cant expression," that in equity "what is to be done, is considered as done." This fiction is, indeed, reasonable and just when applied to the succession of persons entitled under the limitations of a will or settlement, because it is necessary, in order to give effect to the intentions of the testator or settlor, that the property should pass in the same line of succession as if it were land; and therefore, in case of intestacy, to the heir and not to the next of kin. But here the necessity for the fiction ends. And why should it be extended where no such necessity or reason exists? Why should the Crown be precluded from claiming in respect of any money whatever, while it is de facto money, duties imposed upon all personal estate by Act of Parliament, merely because its deceased owner may have directed it to be laid out in land? When it is remembered that, as this very case shews, property clothed with this trust may pass, not only through a long

(1) 1 Bro. C. C. 223, 237.

succession of persons entitled to limited interests, but from generation to generation, to a succession of heirs entitled to an absolute interest in the whole property, it cannot be supposed that the legislature intended to confer a power upon any one who might think fit to create such a trust, to exempt his personal estate from duties to which it is liable by law for an indefinite period of time. I am of opinion, therefore, that the principle or equitable fiction upon which courts of equity have so long held that money to be laid out in land is, for certain purposes, to be treated as land, is inapplicable to the interpretation of the statutes imposing duties upon personal estate; that these statutes must be read according to the plain and ordinary meaning of the language which the legislature has used; and consequently that this money not having been actually laid out in land, is liable to duty on personal estate under the Legacy Duty Acts. Virtually the equitable rule ceases to apply where any one becomes entitled to an absolute interest in money to be laid out in land, and has himself put an end to the trust by treating it as money, and requiring it to be paid over to himself, or doing any other act testifying his election to treat it as personal estate. This was determined in *Chichester* v. *Bickerstaff*. (1) That decision was, indeed, questioned by Lord Talbot in *Lechmere* v. *Lechmere* (2), and by Sir Joseph Jekyll in *Lechmere* v. *Earl of Carlisle* (3), but confirmed by Lord Thurlow in *Pulteney* v. *Earl of Darlington* (4), and by the determination of the House of Lords in the same case (5): see also Jarman on Wills, 3rd ed. vol. i. p. 566; and Williams on Executors, 6th ed. vol. i. p. 625. And Lord Eldon, in *Wheldale* v. *Partridge* (6), observes upon money impressed with the character of land: "To put an end to that impression, it must be shewn that the money was in the possession of a person who had himself the rights of both heirs and executors, or he must do some act to denote a change of his intention as to the devolution of the property upon either."

The result of these decisions, supported as they are by the authority of Lord Eldon, who entirely approved of *Pulteney* v. *Earl of*

(1) 2 Vern. 295.
(2) Cases temp. Talbot, 80, 90.
(3) 3 P. Wms. at p. 221.
(4) 1 Bro. C. C. 223.
(5) 7 Bro. P. C. 530 (Tomlin's edition).
(6) 8 Ves. at p. 235.

1869

IN RE DE LANCEY.

Darlington (1), is to shew that, in the words of Lord Thurlow, "where a sum of money is in the hands of one, without any use but for himself, it will be money." (2) Here the money at the death of the daughter, when the petitioner became entitled, and the duty attached, was in the hands of the trustees, and not of the petitioner. But I am of opinion that neither the letter nor the spirit of the Legacy Duty Acts admit of any distinction in the liability to duty between a legal and an equitable right to a sum of money, and that therefore the money in question was liable to duty under 36 Geo. 3, c. 52, and consequently exempt from duty under 16 & 17 Vict. c. 51

In this view of the case it may be unnecessary to express any opinion upon the question whether the testator or his daughter Susanna is to be deemed the predecessor of the petitioner under the Succession Duty Act. But as a Court of Appeal may hold that this case is governed, not by the Legacy Duty Acts, but by the Succession Duty Act, I must state my opinion to be, that inasmuch as the petitioner became entitled to this money, not by reason of any "disposition" in the will of the testator, but by a "devolution by law," that is, by the rule in equity which operated upon the transmission or devolution of the money as land, the daughter Susanna, and not the testator, must be deemed the predecessor of the petitioner from whom his interest was derived under 16 & 17 Vict. c. 51, s. 2.

My Brother Channell requests me to state that he is of opinion that this case falls within the 19th section of 36 Geo. 3, c. 52; and on this ground concurs with me in thinking that the judgment of the Court should be that the succession duty does not attach.

No question arises, or was raised at the bar, as to the rate or amount of legacy duty payable in respect of this money, supposing it liable to duty under the Legacy Duty Acts. On a question put by myself to one of the learned counsel during the argument of the case, an answer was given importing that the rate or the amount of duty to which the money was liable, if not liable to succession duty, was not in question, and would be easily settled on an assessment by the commissioners if the money be held liable only to duty under the Legacy Duty Acts.

(1) 1 Bro. C. C. 223. (2) 1 Bro. C. C. at p. 238.

1869

IN RE DE LANCEY.

The petitioner prays that "the assessment of the said commissioners may be altered or varied, so far as the same makes your petitioner liable to the duty of 5 per cent." This means that the assessment of the petitioner, under the Succession Duty Act, at 5 per cent. is to be altered or varied; and it is this assessment which is thus appealed against, and which the Court being equally divided, and the junior judge having withdrawn, the majority of the Court adjudge shall be set aside, and the appeal allowed. (1)

Judgment for the petitioner.

Attorneys for petitioner: *Townsend, Lee, & Houseman.*
Attorney for the Crown: *The Solicitor of the Inland Revenue.*

THE MAYOR AND CORPORATION OF CARLISLE *v.* GRAHAM AND ANOTHER.

July 2.

Several Fishery—Tidal River—River changing Course—Following Fishery—New Channel—Disturbance of Fishery.

A several fishery in a tidal river, the waters of which have permanently receded from one channel, and flow in another, cannot be followed from the old to the new channel.

DECLARATION, for that the defendants broke and entered the several fishery of the plaintiffs in the river Eden, and fished in the said fishery for fish, and chased and disturbed the fish therein, and caught and converted to their own use divers quantities of the plaintiffs' fish there then found and being.

Pleas: 1. Not guilty.

2. That the said several fishery was not, nor were the said fish, the plaintiffs'.

3. Justification by defendants as servants of the freeholder of the soil on and over which the alleged fishery was.

4. Justification by defendants as lessees of the freeholder.

(1) Some discussion took place as to the mode in which judgment ought to be entered, the Court being equally divided, and it was suggested that the Crown was entitled to maintain the assessment. Eventually, however, the course above indicated was taken. Cleasby, B., the junior Baron, withdrew, and judgment was given for the petitioner.

1869

MAYOR, &c. OF CARLISLE v. GRAHAM.

Replications: 1. Joining issue on the defendants' pleas.

2. For a second replication to the third plea of the defendants, that the river Eden was a river in the county of Cumberland, in which the tides and waters of the sea flowed and reflowed, and that the plaintiffs had a prescriptive right to the several fishery therein, in the declaration mentioned.

3. For a third replication to the third plea, claim by the plaintiffs to the several fishery in the declaration mentioned under royal charter.

4 & 5. Similar replications to the fourth plea.

Rejoinder taking issue on the second and subsequent replications to the defendants' third and fourth pleas.

The following particulars of the situation and limits of the fishery were delivered:—The several fishery claimed by the plaintiffs extends over the whole of that part of the river Eden, in the parish of Beaumont, in the county of Cumberland, which is situate between the draught or pool in the said river called Back O'Garth and the draught or pool in the said river called Bank End Pool.

The principal question raised by the facts of the case, which are fully detailed in the judgment of Kelly, C.B., was whether the several fishery of a subject of the Crown in a tidal river, the waters of which have permanently receded from a portion of its course, and flow into another course, is transferred from the old to the new course. The defendants further contended that, under the circumstances, the plaintiffs had abandoned their rights, if any, or that, if not, they were barred by the Statute of Limitations, 3 & 4 Wm. 4, c. 27, s. 3.

At the trial before Lush, J., at the Cumberland spring assizes, 1868, a verdict was entered for the defendants, with leave to move to enter a verdict for the plaintiffs; and a rule was obtained accordingly in Easter Term, 1868.

May 24, 25, 26, 1869. *Manisty, Q.C.*, *T. Jones, Q.C.*, and *R. G. Williams*, shewed cause. The owner of a several fishery in a tidal river flowing through a manor, does not acquire a new fishery by reason of the river altering its course. But that is what the plaintiffs contend for in this case. They wish to *follow* their fishery,

i.e., to make themselves possessors of a new several fishery in a tidal river. Such a right, however, cannot be claimed since Magna Charta, unless granted by the Crown as being previously owner of the soil of the river and of the fishery. Nor is it reasonable that the lord of the manor through which the river in its new course, passes, should be compelled to allow the claimant to the fishery to come into his estate to exercise an exclusive right to fish. Comyn's Dig. tit. Grant G. 12. Again, if the plaintiffs could ever have been entitled to the new fishery, they have lost their rights. Non-user on their part, taken together with user for more than sixty years by the defendants, indicates an intention to abandon: *Crossley* v. *Lightowler.* (1) A several fishery is a corporeal hereditament: Comyn's Dig. tit. Piscary; The *Fishery Case,* Davy's Reports, p. 55; *Reg.* v. *Old Alresford* (2); *Duke of Somerset* v. *Fogwell* (3); *Holford* v. *Bailey* (4); *Marshall* v. *Ulleswater Steam Navigation Company* (5), and therefore the plaintiffs are barred by the Statute of Limitations, 3 & 4 Wm. 4, c. 27, s. 3. Or, supposing that the several fishery is incorporeal, trespass will not lie.

Mellish, Q.C., and *Kemplay,* in support of the rule. The fact of the river having changed its course does not deprive the plaintiffs of their right. The test is whether the river remains tidal: Hale, De jure maris, part 1, c. 6, p. 34; 1 Rolle, Abr. 390, tit. Chimin A. 2. A river is a highway, and remains one, though its course be changed: Roscoe on Criminal Evidence, 6th ed. p. 535. Wherever the water goes, all *public* rights follow: Hale, De jure maris, part 1, c. 4, p. 15. Why should not the same principle hold good of a private right? The burden on the lord of the manor is less if the plaintiffs are entitled than if they are not. For the river in its new course being "navigable" or "tidal" (two words which connote each other: *Murphy* v. *Ryan* (6)), the lord must suffer some inconvenience. The fishery certainly is not his, and if it is not the plaintiffs' it belongs to the public, who will, at all times be at liberty to fish: *Attorney-General* v. *Lord Lonsdale* (7); *In re Hull*

(1) Law Rep. 3 Eq. 279; Law Rep. 2 Ch. 478.
(2) 1 T. R. 358.
(3) 5 B. & C. 875.
(4) 13 Q. B. 426.
(5) 3 B. & S. 732.
(6) 2 Ir. Rep. C. L. 143.
(7) Law Rep. 7 Eq. 377.

1869

MAYOR, &C. OF CARLISLE v. GRAHAM.

and Selby Railway Company. (1) Then, if the plaintiffs had the right, it has not been barred by the 3 & 4 Wm. 4, c. 27, s. 3, which only applies to corporeal hereditaments. But this hereditament is incorporeal according to the decision in the *Duke of Somerset* v. *Fogwell.* (2) See also *Herbert* v. *Laughluyn* (3); *Waddy* v. *Newton.* (4)

[BRAMWELL, B., referred to Willes, J.'s remarks, as to "free and several" fisheries in *Malcolmson* v. *O'Dea.* (5)]

Although "free" is the proper term to describe a fishery in a river where the tide flows and reflows, it is sufficiently described as a "several fishery," which, as is said by Willes, J., means "an exclusive right to take fish in a particular place, either with or without the property in the soil." But, although incorporeal, trespass will lie for a disturbance of it, inasmuch as it is an exclusive right to a particular profit.

Lastly, the plaintiffs have done nothing from which an abandonment can properly be inferred: Gale on Easements, 3rd ed. p. 48. They claim as the possessors of a royal franchise, and there is no evidence that they have ever surrendered it to the king, or that it has been dedicated to the public, or granted under seal to the defendants or any one else.

Cur. adv. vult.

July 2. The following judgments were delivered:—

KELLY, C.B. In this action the plaintiffs claim a several fishery in a portion of the river Eden, called "the Goat," about half a mile in length and extending from a point marked upon the plan, which was laid before us, as Thornbush Draught [Back o' Garth] to Bank End Pool. The river Eden is a tidal river, and the plaintiffs are entitled to two several fisheries, the one called the Free Boat and the other the King Garth, derived under grants and charters of Henry III. and Edward II., confirming more ancient grants anterior to Magna Charta. The Free Boat fishery extends from the highest point to which the tide flows, to the point at which the King Garth fishery begins; and the King Garth fishery

(1) 5 M. & W. 327.
(2) 5 B. & C. 875.
(3) Cro. Car. 492.
(4) 8 Mod. 276.
(5) 10 H. L. at p. 618.

from that point to the head or upper part of the Goat, and thence formerly proceeded eastward in a semicircular course along what was once a portion of the river Eden, and which has been called in argument the Loop, and fell into the old river near Bank End Pool, at the lower end of the Goat.

It was at one time contended, that the King Garth fishery continued throughout the semicircular Loop to Bank End Pool; but it was afterwards admitted, and is the fair result of the evidence, that it terminated at or near a point called Cargo Holme, and that the fishery from that point to Bank End Pool belonged to the Earl of Lonsdale or his predecessors in title, the corporation being entitled only to a third boat or draft. In this part of the river, before or about 1693, the waters of the Eden began to recede from the Loop and to pass up and down the Goat, which was at that time a ditch with very little water in it, and at parts entirely dry. The soil of the Goat, the lands on both sides of it, and the fishery, and the fishery throughout the whole course of the river from Bank End Pool to the sea have belonged to the Lowther family, now represented by the Earl of Lonsdale, under whom the defendants claim, from the earliest times to the present day. In 1693, when the fish began in any numbers to make their way up the Goat and so to desert the Loop and the King Garth fishery of the plaintiffs, a deed was made by which Sir John Lowther granted to the corporation liberty to fix posts and stakes, and to use boats and spread nets and other utensils for fishing, for the more easy and better management of the King Garth fishery.

The defendants allege that this was with a view to the erection of a weir or dam, and by that and other means to stop the passage of the fish up the Goat and turn them into the Loop and the fishery of the corporation. The plaintiffs insist that it is the effect of this deed to recognise their right to fish in the Goat.

It is unnecessary to pronounce any opinion upon this point. The evidence shows that in fact the waters of the Eden at length, by slow degrees altogether receded from the Loop, and made themselves a passage through the Goat, leaving the whole of the Loop dry land, and converting the Goat into a permanent integral portion of the tidal river. Between 1693 and 1760, several leases were granted by the corporation of their fisheries of King Garth and Free

1869

MAYOR, &C. OF CARLISLE v. GRAHAM.

Boat, and in one of them of 1711, they covenanted for the quiet enjoyment of the fishing called King Garth and Goat, and other the premises. In 1723, 1744, and 1755, the Lowthers granted leases of all their fisheries in the Eden to the corporation. The last of these leases expired in 1758. In 1760, a bill in chancery was filed by the corporation against Sir James Lowther, to establish their right, inter alia, to fish in the Goat. Evidence was taken upon depositions, the result of which was certainly far from supporting the claim of the corporation; but it is really immaterial whether this was so or not; for inasmuch as the right of a fishery in the corporation could only be derived from a grant or grants anterior to Magna Charta, and the Goat was mostly dry ground until the 17th century, it is clear that the claim of the corporation depends upon whether in point of law the fishery to which they were entitled in the Loop when it formed a part of the tidal river, was transferred to the Goat, and became their several fishery therein, when the waters had receded from the Loop, and flowed into and through the Goat, making it a portion of the river. The fishery suit seems to have terminated in a compromise, for no decree is to be found, and three years later, in 1763, and from that time till 1781, a number of leases appear to have been granted by the corporation to their tenants, not only of the Free Boat and King Garth fisheries, but of all the fisheries of the Lowther family within the river Eden. The last of these leases expired in 1784. The corporation must therefore have taken leases from the Lowthers of their fisheries in the Eden between 1760 and 1781, though none such appear upon the case. From 1784 to 1794 the Free Boat fishery appears to have been leased by the corporation to one Askham, or retained in their own lands; and from 1794 to 1842, was leased to the late Earl of Lonsdale at 32*l.* a year. The King Garth fishery and the Goat are no more mentioned, after 1784, except that we find that on the 12th of October, 1805, Lord Lowther appears to have purchased of the corporation their boats and nets at King Garth, and that they on that day, paid to him 105*l.* for twenty-one years' rent of the Goat fishery, at 5*l.* per annum. From 1842 to 1866, the year before this action was brought, one Ralph held the Free Boat fishery under the corporation and the Goat fishery under Lord Lonsdale.

Such are the leading facts of the case; and upon these the question arises, whether upon the change in the course of the river from the Loop to the Goat as above described, the corporation became entitled to the several fishery in the Goat to which they had been before entitled in the Loop or ancient course of the river.

The defendants deny their right to any fishery at all in the Goat, and insist that upon the receding of the waters from the Loop, the several fishery came to an end at the point at which the Loop began. And we are called upon to decide the question which now arises for the first time,—Is the several fishery of a subject in a tidal river, the waters of which permanently recede from a portion of its course and flow into and through another course, where the soil and the land on both sides of the new channel thus formed belong to another subject transferred from the old to the new channel, and so a several fishery created in and throughout such new channel, or in some, and if in any, in what part of it? No authority has been cited at the bar nor is any to be found in the books to the effect that, under such circumstances, a several fishery is extended into or created in the new channel thus formed in the tidal river.

It is said in Rolle's Abridgment, and appears to have been remarked by Thorp, J., in a case in the Year Books, 23 Edw. 3, c. 93, that wherever the tide flows and reflows it may be called an arm of the sea, and if the water be a highway and changes its course from one soil to another, still it becomes a highway there where the water flows, as it was before in its ancient course, so that the lord of the soil cannot disturb the waters in this new course. But this proposition, if true, as regards the use by the public of the tidal waters as a highway, or the exercise of any other public right, fails to shew that a private right to a several fishery arises within the new course of the tidal waters. In the case of *Murphy* v. *Ryan* (1), O'Hagan, J., in delivering the judgment of the Court, says, "But whilst the right of fishing in fresh water rivers in which the soil belongs to the riparian owners is thus exclusive, the right of fishing in the sea, its arms and estuaries, and in its tidal waters, wherever it ebbs and flows, is held by the common law to be publici

(1) 2 Ir. Rep. C. L. 143, at p. 149.

1869

MAYOR, &c. OF CARLISLE v. GRAHAM.

juris, and so to belong to all the subjects of the Crown, the soil of the sea, and its arms and estuaries and tidal waters being vested in the sovereign as a trustee for the public. The exclusive right of fishing in the one case, and the public right of fishing in the other, depend upon the existence of a proprietorship in the soil of the private river by the private owner, and by the sovereign in a public river respectively." And this is the true principle of the law touching a several fishery in a tidal river. If, therefore, the right of the Crown to grant a several fishery in a tidal river to a subject is derived from the ownership of the soil, which is in the Crown by the common law, a several fishery cannot be acquired even in a tidal river if the soil belong not to the Crown but to a subject. And all the authorities, ancient and modern, are uniform to the effect that if, by the irruption of the waters of a tidal river, a new channel is formed in the land of a subject, although the rights of the Crown and of the public may come into existence and be exercised in what has thus become a portion of a tidal river or of an arm of the sea, the right to the soil remains in the owner, so that if at any time thereafter the waters shall recede and the river again change its course, leaving the new channel dry, the soil becomes again the exclusive property of the owner, free from all rights whatsoever in the Crown or in the public. (See Hale, De Jure Maris, pars prima Hargraves Tracts, pp. 5, 6, 11, 13, 16, 37.)

If, then, the title of the corporation to the fishery is derived from a grant by the Crown, and the title of the Crown to grant from the ownership of the soil, how can the corporation claim a right to the fishery in the Goat, where the soil does not and never did belong to the Crown?

Other difficulties present themselves in the way of this claim. Throughout what portion of the Goat can the King Garth several fishery be extended? Not to the whole of it, for the fishing of the corporation did not extend throughout the whole of the Loop, nor to the same length of space as it occupied in the Loop, for the Goat and the Loop are not of equal lengths, the Goat being much shorter than the Loop. Besides, the grant to the corporation must have been of some definite portion of the river, inasmuch as the King Garth fishery began where the Free Boat fishery ended, and ended

where the Lowther fishery began. How then can a several fishery in the Eden, from the lower end of the Free Boat fishery to a point near Cargo Holme in the Loop, be converted into a fishery from its upper terminus to some undefined point on the Goat?

If, then, the claim of the corporation cannot be maintained upon the ground that the fishery was transferred from the Loop to the Goat, it is clear that it cannot be maintained at all. The Goat has now become a portion of a tidal river or arm of the sea, and a several fishery there cannot exist in a subject, but by a grant from the Crown anterior to Magna Charta. And until some period of time, between 1693 and 1760, the Goat was dry land where no fishery could have existed. It was argued for the plaintiffs that the grant by Sir John Lowther, in 1693, conferred or recognized a right to fish in the Goat, and that the corporation have exercised the right at various periods between 1693 and 1805, but the Goat having become a portion of a tidal river, no grant by a subject and no length of user by a corporation since 1693, even if the grant of 1693 could be thus construed and any evidence existed of such user, could confer a right to a several fishery therein. The claim of the corporation therefore altogether fails.

In the view thus taken of the principal points in the case, it becomes unnecessary to consider whether the right to this several fishery, if it ever existed, has been lost or extinguished by non-user or otherwise. I may, however, observe, that supposing the Acts of Parliament, which, in effect may be called statutes of limitation touching claims to property corporeal and incorporeal, to be inapplicable to the case before us, it is yet difficult to sustain a claim to a several fishery in a tidal river after a non-user for nearly a century, and where, supposing no several fishery to exist, the public may claim a right to fish by reason of the waters having become a portion of an arm of the sea.

It appears upon the evidence that from 1784 to 1805, the corporation paid a rent of 5*l.* a year to the Lowthers for the Goat fishery. It is said that this was a payment made under the grant of 1693, and it may be so; but yet the payment, whether made under or with reference to that grant or not, being admitted by the corporation to have been made for the Goat fishery, is wholly inconsistent with a right in them to a several fishery in the Goat;

1869

MAYOR, &C. OF CARLISLE v. GRAHAM.

while, on the other hand, one Ralph has enjoyed a fishery there for upwards of thirty years last past under the Earls of Lonsdale.

If it be possible, therefore, by non-user, to dedicate a fishery in a tidal river to the public, the facts of this case afford some evidence of such a dedication between the years 1780 and the present time.

Upon these grounds I am of opinion that the claim of the corporation is not sustained; that the verdict for the defendants must stand; and that the rule must be discharged.

BRAMWELL, B. I am of the same opinion; but I desire to add a few observations, as the point argued before us was one of novelty.

In this case the question is not whether the defendants have any, and what right, but whether the plaintiffs have a several fishery. The burthen of proof is on them. They must prove title to a several fishery which existed before Magna Charta. They say they do so by shewing a several fishery in a part of the Loop, and that the Goat is a new tidal channel in place of the Loop; and so they say they have a several fishery in a part of the Goat. It is for them to shew affirmatively why this does follow as a consequence on the change in the course of the river, not for the defendants to shew why it does not. It is difficult to prove and to argue a negative, and I might content myself with saying, that I see no reason why the alleged consequences should follow. But the argument for the plaintiffs I understand to be this:—that the plaintiffs had a fishery in the Eden from a certain point "down the river," and that from that point, "down the river" now leads along the Goat, therefore the plaintiffs' fishery is there; the fishery was formerly along the then public highway of the Eden, therefore it is now along the new public highway of the Eden. I repeat, I think it would be enough to say as to this argument, that though the premises are true, the consequence does not follow. The plaintiffs had a several fishery which, no doubt, must have been granted or acquired by metes or bounds; the locus in quo is not within those metes and bounds. The plaintiffs had a several fishery over the soil and freehold of the Crown. This is not the soil and freehold of the Crown. It may be subject to the public right of navigation as a highway, but how has it become subject to this right of the plaintiffs? When did it so become? As the

change of the river's course was gradual, there must have been a time when the river ran in both channels and fish were found in both. Had the plaintiffs at that time a several fishery in both channels? Suppose the owners of the soil of the Goat, on the formation of a channel and before evidence of dedication to the public, had thought fit, as they might have done, to stop the inlet of the waters, could they not have done so, notwithstanding there were fish in the Goat? I should think they could. But if so, they could destroy the plaintiffs' fishery; so that it would be a several fishery in the plaintiffs, with a right to another to destroy it. Again, suppose the plaintiffs cleansed out the old Eden, would they not have a several fishery there? and can they have a right in both waters under a grant, within the metes and bounds of which both waters certainly would not be? Further, I think the right to grant a several fishery arises from the ownership of the soil. But the Crown is not, nor is shewn ever to have been, the owner of the soil of the Goat.

This question in this case arises for the first time, and I think that the plaintiffs do not give us sufficient reasons for answering it in their favour. Reference was made to Rolle's Abridgment, tit. Chimin, and to a case in the Year Books, 23 Edw. 3, c. 93, where Thorp, J., says, that wherever the tide flows and reflows it may be called an arm of the sea, and if the water be a highway, and changes course from one soil to another, still it becomes a highway there where the water flows, as it was before in its ancient course, so that the lord of the soil cannot disturb the waters in their new course. This may be true as regards the public right of navigation, or any other public right, but does not establish the right to a several fishery in the new course of the river.

But there is a further consideration, which I think fatal to the plaintiffs. If they have a several fishery in the Goat, its extent must be capable of ascertainment—not for the purposes of this action, as the defendants have fished the whole length of the Goat, but in point of law it must be a fishery from some one definite point to some other definite point. There must be some rule by which it can be ascertained; but in fact there is no such rule here. It is not the whole length of the Goat; nor do I think a rule of three sum would ascertain the matter, viz.: as the length of the

1869

MAYOR, &C. OF CARLISLE v. GRAHAM.

Loop was to the length of the Goat, so is the length of the old fishery to that of the new. Nor can I see that this solution, or one reaching by a line drawn from the terminus of the fishery in the Loop to the Goat, would be just or reasonable to the owners of the fishery below that of the plaintiffs. It seems to me, therefore, that even if the plaintiffs, had they been owners of the fishery the whole length of the Loop, could (as I think they could not) have made title to the Goat, that not being such owners the whole length of the Loop, they cannot. The measure of their right is lost.

I have said nothing about the fact that the plaintiffs themselves caused this desertion of the old and formation of the new channel; but it certainly does seem a strong thing to say that by their own act they have acquired this right over another soil. I think this consideration fatal to them, even supposing that they would have been right if the new channel was the work of nature. I think, therefore, the defendants entitled to judgment.

As to the second point, it is unnecessary to decide it with the opinion I have; but I may say that, as at present advised, I could not decide it in favour of the defendants, for it seems to me no statute of limitations applies; and I can see no sufficient evidence of an abandonment to the public of this right, if it ever existed. My Brother Channell concurs that our judgment should be for the defendants.

Rule discharged.

Attorneys for plaintiffs: *Gray, Johnston, & Mounsey.*
Attorneys for defendants: *James, Curtis, & James.*

DAVIS *v.* HAYCOCK.

1869
July 2.

Sale of Shares—Usage of Stock Exchange—Principal and Agent—Relation of Primary Seller and Ultimate Buyer.

The defendant purchased, through his brokers on the Stock Exchange, for the 15th of May, 50 shares in Overend, Gurney, & Co., Limited; and on the name-day (the 14th) his brokers issued a ticket for the shares in his name to the selling jobber. On the 16th the same jobber bought of the plaintiff, through the plaintiff's broker on the Stock Exchange, thirty shares in the same company; and having, in conformity with the usage of the Stock Exchange, divided the defendant's ticket, he handed to the plaintiff's broker, in part performance of his contract, a ticket containing the defendant's name as purchaser of ten shares. The plaintiff's broker having (according to usage) paid to the jobber the sum stated on the ticket, being the price at which the defendant had bought, delivered to the defendant's brokers a transfer to the defendant at that price, duly executed by the plaintiff, together with the share certificates. The defendant's brokers thereupon repaid to the plaintiff's broker the purchase-money, which was at their urgent request repaid to them by the defendant, who also received from them and retained the transfer and share certificates, but did not otherwise adopt the contract.

The defendant's purchase of shares was made before the 10th of May, at a substantial price; on that day the company stopped payment, and the plaintiff's shares were sold on the 16th at a discount exceeding the nominal value, that is, the amount paid up on the shares. Up to the 10th a transfer of the shares might have been registered without difficulty, but after that day the directors refused to register transfers.

Two calls having been made on the ten shares, which the plaintiff as registered holder had been compelled to pay, he brought an action against the defendant to recover the amount, alleging a contract by the defendant to purchase the shares of the plaintiff and to indemnify the plaintiff against calls:—

Held, by Kelly, C.B., and Pigott, B., that the defendant had contracted as alleged, and that he was therefore liable to repay to the plaintiff the calls so paid by him, and that the declaration was rightly framed.

Held, also, that the stoppage of payment on the 10th of May made no difference.

By Channell and Cleasby, BB., that no such contract existed as alleged, and therefore (without deciding that the plaintiff had no remedy at law against the defendant) that the plaintiff could not recover upon the declaration as framed.

SPECIAL CASE: Declaration, that, in consideration that the plaintiff would sell to the defendant certain shares belonging to the plaintiff in Overend, Gurney, & Co., Limited, and would execute and deliver to the defendant a transfer of the said shares, the defendant agreed to buy, accept, and pay for the same, and to execute the transfer thereof, and to indemnify the plaintiff from all subsequent

1869

DAVIS v. HAYCOCK.

payments and liabilities in respect of the said shares, or in respect of any calls which might thereafter be made upon or in respect thereof; that the plaintiff did sell the said shares to the defendant, and did execute and deliver the transfer thereof to the defendant pursuant to the agreement; and that although the defendant accepted and received payment for the same pursuant to the agreement, and although the plaintiff had performed and been ready and willing to perform all things on his part to be performed in pursuance of the agreement, and although all things had happened and times elapsed to entitle the plaintiff to performance of the defendant's agreement, and although, after the sale of the shares and the making of the agreement, and before the commencement of the suit, the plaintiff as registered owner of the shares became liable to divers calls duly made upon and in respect of the said shares after the sale and agreement, and was obliged to pay the same, of all which the defendant had reasonable notice, and was requested to indemnify the plaintiff from the said payments and liabilities; yet the defendant did not nor would execute the transfer, nor indemnify the plaintiff, although a reasonable time had elapsed. The declaration also contained counts for money paid, and on accounts stated.

Pleas: 1. To the first count, denial of the promise.

8. To the same, on equitable grounds, that the sale was made subject to the articles of association of the company; whereby it was provided that no transfer of shares should be entered on the books of the company until it should have been executed by the transferor and transferee and entered on the register of members, the transferor in the meantime to be deemed the holder of the shares, and that the directors may refuse to register until the transferee is approved by the board of directors; that before the plaintiff executed the transfer the company stopped payment, that afterwards a resolution to wind up was duly passed by the company, and an order made by the Court of Chancery that the winding up should be under the supervision of the Court; that after the stoppage of payment the board of directors refused to register any transfer, and that the defendant could not be entered on the register in respect of the shares; and that therefore the defendant refused to accept or execute the transfer, and by reason of the

premises the transfer was at the time of its execution, and still is, wholly useless and void, and the plaintiff never did execute and deliver to the defendant any valid or available transfer.

9. To the residue of the declaration, never indebted. Issue.

The defendant, on the 14th of April, 1866, bought through his broker, of Gibson, a jobber, fifty shares in Overend, Gurney, & Co., Limited, at $\frac{5}{8}$ discount; the shares were bought for the 27th of April, but were afterwards carried over to the next account day, the 15th of May, at $\frac{3}{4}$ instead of $\frac{5}{8}$ discount, Gibson paying backwardation.

On the 16th of May the plaintiff through his broker sold to Gibson for immediate delivery thirty shares in the same company at 16*l.* discount, 15*l.* being already paid up on each share.

On the 10th of May the company stopped payment, and on the 11th a winding-up petition was presented, on which a decree was ultimately made.

On or about the 14th of May the defendant's brokers, as purchasing brokers, issued to Gibson as seller a ticket for the fifty shares at $\frac{3}{4}$ discount. Gibson issued a ticket for ten out of the fifty shares to Messrs. Ackroyd, jobbers, of whom he had purchased shares; and on the 16th or 17th of May he handed to the plaintiff's broker the same ticket with the indorsements of Messrs. Ackroyd and other brokers or jobbers through whose hands it had passed in settlement of various share transactions, and through whom it had returned to Gibson.

In conformity with the rules of the Stock Exchange (1), the plaintiff's broker as selling broker paid to Gibson the sum of 142*l.* 10*s.*, the price mentioned on the ticket. This sum was afterwards repaid to him by the defendant's brokers on their receipt of the transfer and certificates; and at their urgent request, the defendant repaid to them the same sum, and also the difference (2) between that price and the price at which the shares were originally purchased by him of Gibson on the 14th of April.

(1) For the usage of the Stock Exchange, see *Maxted* v. *Paine*, ante, at pp. 205—207.

(2) This payment was made in pursuance of the custom of the Stock Exchange, by which, on a share transaction being carried over, the difference between the price at which the shares were originally bought and the price at which they are carried over becomes a debt immediately due from the buyer to the seller (or vice versâ).

1869

DAVIS v. HAYCOCK.

The transfer, which stated the defendant as purchaser and the price of the shares as 142*l.* 10*s.*, was duly executed by the plaintiff, and the transfer and share certificates were delivered by the plaintiff's broker to the brokers of the defendant, and by them to the defendant, and were never returned by him.

Before the stoppage of the company the name of the defendant might have been registered as holder of the ten shares without difficulty; but after that date the directors refused to register any transfer.

Two calls of 10*l.* each had been made since the stoppage, which the plaintiff, whose name still remained on the register, had been compelled to pay, and the present action was brought to recover the amount of these payments.

Jan. 20. *Sir G. Honyman, Q.C.* (*Day* with him), for the defendant.(1) No contract ever existed between the plaintiff and defendant. The plaintiff originally sold to Gibson, and contracted with him alone; the defendant also bought of Gibson and contracted only with him; and nothing has been done by which these two distinct and independent contracts have been consolidated into a new single contract between the plaintiff and defendant. If by subsequent agreement the plaintiff and defendant had agreed with Gibson that the plaintiff should be the only seller and the defendant the only buyer, and that Gibson should be discharged from both his contracts, that state of things would have existed which the plaintiff alleges and on which he must rely. And such a state of things did arise in those cases which seem most favourable to the plaintiff's contention, where the parties by words or acts accepted one another as the contracting parties. But nothing has been done here from which such a mutual acceptance can be inferred; the defendant has never executed the transfer, and has repudiated his liability to the plaintiff. The case is clearly distinguishable from *Grissell* v. *Bristowe* (2) and *Coles* v. *Bristowe* (3); for the only question raised in those cases was, whether the jobber had performed his contract with the seller; it was held that he had performed it by giving to the seller

(1) The case being called on unexpectedly, no argument was addressed to the Court by the counsel for the plaintiff.

(2) Law Rep. 4 C. P. 36.

(3) Law Rep. 4 Ch. App. 3.

on the proper day the name of some one not open to objection, and not objected to, who was willing to take the shares from him. Similarly the jobber's contract with the purchaser would apparently be performed if he gave to the purchaser the name of some one who was willing to sell to him. And if two persons willing to buy and sell respectively were really thus brought together, no doubt there would be a contract. Here, however, though the plaintiff was willing to sell to the defendant, the defendant was not willing to buy of the plaintiff. It would seem, therefore, that although Gibson, who was both the buying and the selling jobber, has performed his contract with the defendant, he has not performed his contract with the plaintiff. The buyer may at any time before acceptance refuse to enter into a contract with the person who is proposed to him. If he will not accept the willing and unobjectionable seller who has been found for him, he has no cause of complaint against the jobber, who has performed his contract. And although, trusting to his acceptance of the substituted seller, the jobber may not be in a position himself to deliver the shares on the day named, and may for that reason be unable to recover on the defendant's original contract to accept the shares from himself; yet he may attain the same result by an action against the defendant, for breach of his implied contract to accept any willing and unobjectionable seller who may be found for him by the day named. But all this does not make the buyer a contracting party with the seller so found. The plaintiff on the other hand (the seller) may complain that the jobber has not given him the name of a willing purchaser, and may compel the jobber to take to the shares himself; and if, as in the present case, there is no one intermediate between the jobber and the ultimate purchaser, the jobber is not injured, for he already has his compensation (the character and quantity of shares bought and sold being the same) in the action to which he is entitled against his purchaser for not accepting the willing seller; if, on the other hand, there is one or more intermediate jobbers, the same result is ultimately reached by following out the series of transactions. This however shows, not that a contract has ever been made between the willing seller and the unwilling purchaser, but only that in the result, and by a circuity, the same effect is produced as if there had been a contract.

1869

DAVIS v. HAYCOCK.

[CLEASBY, B., referred to *Hodgkinson* v. *Kelly* (1); *Hawkins* v. *Maltby*. (2)]

Those cases only establish that to avoid that circuity a Court of Equity will adjust the matter directly between the ultimate buyer and seller; and the decisions go no farther than this, though some expressions used seem to sanction the idea of a contract.

But, secondly, the plaintiff's case is open to the further difficulty that the defendant does not get either what he contracted for, or what the plaintiff sold. He bought shares in a going company, and the plaintiff sold shares in a company that was being wound up. The contract made with the defendant cannot now be fulfilled: *Bermingham* v. *Sheridan*. (3)

[CLEASBY, B., referred to *Rudge* v. *Bowman*. (4)]

There, the winding up had commenced at the time of the bargain being made on both sides. The present case rather resembles that of a purchaser of a thing for a future day, before the arrival of which the thing is wholly changed in character. The seller may be liable to damages for not performing his contract to deliver, though its performance may have become impossible; but the purchaser cannot be compelled to take something different from what he bought. Although *Rudge* v. *Bowman* (4) shews that a contract for the sale of shares in a company then being wound up may be good, the transfer and registration being still possible, it does not shew that the change in all the incidents of a transfer of shares, which is produced by winding up, does not make such a transfer a different thing from a transfer of shares in a going company.

Thirdly, assuming any power to exist in the jobber to make the defendant party to a contract with a third person, that power must be exercised before the account day. The engagement of the purchaser cannot at the utmost be put higher than this, that, with respect to the shares bought by him of the jobber, he makes the jobber his agent to contract on his behalf for the purchase of an equal number of shares from any third person who may on or before the name-day agree to sell, and whose name the jobber may give to his broker on that day, and that in the event of such a name being given the jobber shall be discharged from his original

(1) Law Rep. 6 Eq. 496.
(2) Law Rep. 6 Eq. 505.
(3) 33 Beav. 660; 33 L. J. (Ch.) 571.
(4) Law Rep. 3 Q. B. 689.

(3 SC 10 Jur NS. 415.

contract to sell. If no such name is given on that day, the jobber remains liable, the period within which his authority was to be exercised having expired. When the account day arrives the transaction is to be at once completed, and to be completed upon the basis settled by the interchange of names on the previous day. The account day is, therefore, too late to make the new contract. But in the present case, not only was no name given, but the plaintiff had not even contracted to sell till after the account day itself was passed. The effect is the same if the broker only is looked upon as the agent (which is more reasonable), and his authority treated as an authority to accept another seller in place of the jobber; the authority must still be exercised not later than the name-day; if it may be exercised two days afterwards, there is no reason why it may not be exercised after two months.

Cur. adv. vult.

On a later day the Court asked *Mellish, Q.C.*, for the plaintiff, whether he would amend his declaration; but he declined to do so and the case stood over for judgment.

July 2. The Court (Kelly, C.B., Channell, Pigott, and Cleasby, BB.) differing in opinion, the following judgments were delivered:—

CLEASBY, B. I have to deliver the judgment of my Brother Channell and myself.

This is not a case stated by consent without pleadings, but a cause which went down to trial in the usual way, and a verdict was found for the plaintiff, subject to a special case, with power to amend the pleadings.

The case was argued last Term, and after the argument the counsel for the plaintiff had the option given him of amending the declaration. But he declined to make any amendment, and therefore the question arises whether, as the contract alleged in the declaration is traversed, the facts stated in the case establish the contract.

The declaration alleges an agreement between the plaintiff and the defendant, that in consideration the plaintiff would sell to the defendant certain shares in a company styled Overend, Gurney, & Co., Limited, and would execute and deliver to the defendant a

1869

DAVIS v. HAYCOCK.

transfer of the said shares, the defendant would buy and accept and pay for the said shares, and execute a transfer thereof, and indemnify and save harmless the plaintiff from all subsequent liabilities and payments. This is the proper mode of alleging in pleading the ordinary contract for the sale of shares in a joint-stock company in which the shares are not fully paid up, it being undoubtedly the duty of the buyer to cause the transfer to be registered and so to cause the name of the plaintiff to be taken off the register of shareholders, and his liability in respect thereof to cease.

It appears to us (upon the facts stated in the case) that there never was any contract of this description between the plaintiff and the defendant.

On the 14th of April, 1866, the defendant bought of Gibson fifty shares at $\frac{5}{8}$ discount, 15*l.* having been paid. This contract was subject to the laws of the Stock Exchange, and was to be completed on the 27th of April, but was afterwards carried over to the next account, the 15th of May, the defendant receiving 1*s.* 8*d.* per share for agreeing to its being so carried over.

The ten shares forming the subject of the present action are part of those fifty shares bought of Gibson; for on the 16th of May (Overend, Gurney, & Co. having stopped payment on the 10th of May), Gibson bought of the plaintiff thirty shares at 16*l.* discount for immediate delivery, and on the same day appropriated ten of them to the performance pro tanto of his contract with the defendant in the manner stated in the case; and (subject to a remark which will be made hereafter, founded upon the sale by the plaintiff being after the 15th of May, which was the day for the performance of the defendant's contract) undoubtedly the contract of Gibson to sell and transfer to the defendant fifty shares, would, according to the regulations of the Stock Exchange, be properly performed, so far as ten shares are concerned, by the transfer from the plaintiff to the defendant of those ten shares.

But the real question is, not how the contract might be performed, but what the contract was; and we are of opinion that there was only one contract of sale to which the defendant was a party, viz., that of the 14th of April, which was a contract between Gibson and the defendant, and that all that took place afterwards

had reference only to the mode of carrying that contract into effect in conformity with the Stock Exchange regulations.

It is the essence of a contract that there should be a concurrence of intention between the parties as to the terms. It is an agreement, because they agree upon the terms, upon the subject matter, the consideration and the promise. But there never was any concurrence or agreement between the plaintiff and the defendant in this case. The defendant agreed with Gibson to buy at $\frac{5}{8}$ discount, that is, to pay 14$\frac{3}{8}$*l.* a share; the plaintiff agreed to sell to Gibson at 16 discount, that is to say, the plaintiff (seller), was not to receive anything, but to pay the buyer 1*l.* a share. The case is not improved by the transfer containing an untrue statement of the consideration received by the plaintiff, so as to give the appearance of a contract between them which never existed in fact; the plaintiff never received 142*l.* 10*s.* (the consideration for the transfer by him as stated in the transfer), but on the other hand paid 10*l.* to get rid of them. This fact shews that the transfer, which is only a contrivance and false in itself, cannot be relied on as a real foundation of liability.

It is also to be remarked that the contract entered into by the defendant with Gibson was to be completed on the 15th of May, and his name was in fact passed on the 14th of May. The defendant never entered into any other contract. But the plaintiff never could perform this contract, for he was not a seller to Gibson till after the 15th, viz., the 16th of May. This is an additional difficulty in the way of there being any contract of sale between the plaintiff and the defendant, for the defendant certainly only entered into one contract of that nature. The only conclusion at which we can arrive is, that the contract between the plaintiff and the defendant alleged in the declaration is not proved.

We are aware that this is at variance with the views of the Master of the Rolls respecting contracts of this nature, expressed by him in the case of *Hodgkinson* v. *Kelly*. (1) In that case his Lordship is reported to have said (2), speaking of persons contracting for the sale and purchase of shares on the Stock Exchange:—"They enter into a contract not with a specified person,

(1) Law Rep. 6 Eq. 496. (2) Law Rep. 6 Eq. at p. 503.

1869

DAVIS v. HAYCOCK.

but with a person whose name is to be disclosed afterwards when the transaction is complete. It is not, as has been supposed, that the seller of shares constitutes an agent to find out and enter into a contract with some particular buyer, or, on the other hand, that the buyer does the same as to the seller, but both parties agree to be bound by the usage of the Stock Exchange, which binds both parties from the beginning, but leaves each of the parties to the eventual contract ignorant of the other till the day arrives and the instrument of transfer is executed."

This may correctly represent the effect of the contract in a Court of Equity, where contracts and choses in action are in many cases assignable, and the assignee may in such cases assign a right to enforce them, and also be bound by them. But with the utmost respect for all that falls from a judge of such experience and eminence, we cannot agree to that view as to the legal effect of the contract entered into. We think that the parties to the contract are fixed from the time when the contract is first entered into. It is the general rule applicable to every contract, that there should be at the same time a party bound by it and a subject in respect of which he is bound, by the agreement of both parties; and the original contract is the only one fulfilling these conditions. It is the only one in which the parties are agreed as to the shares to be sold and the price to be paid for them.

This conclusion is not at variance with that of the Exchequer Chamber in *Grissell* v. *Bristowe*. (1) The parties to that action were the parties to the contract, and all that the Court decided was that the defendants were discharged, having performed the contract according to the regulations of the Stock Exchange.

The case of *Cruse* v. *Paine* (2), decided by Giffard, V.C., afterwards affirmed by Lord Hatherley, C. (3), shews that the only contract of sale is with the jobber. The Vice-Chancellor in that case says (4):—"Jobbers are simply principals, and act as principals, and jobbers are personally liable upon the contracts into which they enter. There is no question whatever about that. I consider that to be perfectly clear."

The decisions in Equity are not more particularly referred to

(1) Law Rep. 4 C. P. 36.
(2) Law Rep. 6 Eq. 641.
(3) Law Rep. 4 Ch. App. 441.
(4) Law Rep. 6 Eq. at p. 649.

because they have no real bearing upon the question of legal remedy, for a reason which has been already adverted to. Courts of law, though they recognise equitable interests and rights, do not (except under the provisions of certain Acts of Parliament) directly enforce them, though they allow a person so entitled to obtain redress by proceeding in the name of the proper parties.

The plaintiff in his points for argument insists that there is a privity of contract between the plaintiff and the defendant. In our opinion he fails, because there is no such privity in relation to the contract declared on.

The answer which the defendant sets up in the eighth plea does not properly arise in this case, the whole transaction being previous to the commencement of the winding up.

It is not the province of the Court to make amendments in the pleadings, and in a case which may be further considered such an amendment might prejudice the party intended to be benefited by it. As the plaintiff has declined to amend, relying perhaps on certain authorities, one of which has been particularly adverted to, we feel bound to deal with the declaration as it stands, and to say that for the reasons given the contract alleged is not proved, and therefore there must be judgment for the defendant.

KELLY, C.B. I am of opinion, and in that opinion my Brother Pigott concurs, that the plaintiff is entitled to the judgment of the Court. The usage or custom in the Stock Exchange, as it enters into the constitution of the contracts which have in several cases been brought under the attention of this and other Courts, in consequence of the failure of Overend, Gurney, & Co., may be well illustrated and explained by its application to the case which we are now called upon to determine.

The plaintiff in the month of May, 1866, sold through his broker Bone, a member of the Stock Exchange, ten shares in Overend, Gurney, & Co. to Gibson, a jobber, also a member of the Stock Exchange. The contract between the plaintiff and Gibson, according to the usage in question, was that Gibson should be himself the purchaser of the shares, and accept the transfer of them on the account day, unless on the day before the account day, which is called the name-day, he should have given the name

1869

DAVIS v. HAYCOCK.

of some other person who had contracted with him to purchase the like number of shares as the ultimate purchaser. If the seller object to the nominee on the ground that he is insolvent, or on any other just ground, the question of his sufficiency is referred to the committee of the Stock Exchange, and if the objection be held good, the jobber remains liable, and must himself fulfil the contract as purchaser. If the objection be overruled by the committee, it has not yet been decided whether the seller may appeal to a court of law or equity, and proceed to enforce his contract against the jobber; but if, on the other hand, the nominee is accepted on the name-day without objection, and has contracted to become the ultimate purchaser, the seller is bound to execute a transfer of the shares to him, and having done so, has performed his contract, and is from that time entitled to treat the nominee as the purchaser, and to be indemnified by him against all future calls.

On the other hand, the defendant, having contracted through Usborne and Burge, his brokers, members of the Stock Exchange, to purchase of Gibson ten shares in Overend, Gurney, & Co., for the account day then following, and the contract having afterwards been carried over to a future account day, the 15th of May, and his name having been given in as nominee on the name-day to the broker who acted for the plaintiff, the seller, he, the defendant, became entitled to enforce the sale as against the seller, and liable to be treated as the ultimate purchaser, and bound to accept the transfer when tendered to him executed by the plaintiff, and to indemnify the plaintiff against future calls.

It has been decided that the seller may compel specific performance in a Court of Equity against the ultimate purchaser, in the case of *Sheppard* v. *Murphy* upon appeal (1), overruling the decision of the Vice-Chancellor in Ireland. (2) It had not been decided that an action at law was maintainable by the seller against the ultimate purchaser until the case of *Street* v. *Morgan* (3), in which judgment was pronounced for the plaintiff in this Court in last Easter term. In that case, however, the point was not adverted to on either side, the defence set up being merely that

(1) Ir. Rep. 2 Eq. 544. (2) Ir. Rep. 1 Eq. 490.

(3) Not reported.

the broker or jobber had no authority to give in the name of the defendant as the ultimate purchaser. In all these cases a number of intermediate contracts may be made for the sale and purchase of shares between the original seller and the ultimate purchaser, and the price contracted for by the original seller is often and almost invariably different from the price paid by the ultimate purchaser; but these circumstances do not affect the validity of the contract on either side according to the usages and customs of the Stock Exchange. In the present case the action by the seller against the nominee or ultimate purchaser is resisted chiefly on the ground that there is no privity of contract between them, and the principal question to be determined is, whether a contract arises binding on both parties, and which can be enforced by an action at law, when the name of the nominee is given in and accepted without objection, according to the usage of the Stock Exchange. The case of *Grissell* v. *Bristowe* (1), in the Exchequer Chamber, overruling the decision of the Court of Common Pleas, decides that where the nominee has been accepted by the seller without objection, no action lies by the seller against the jobber; and the case of *Coles* v. *Bristowe* (2) likewise determines that under the same circumstances the jobber is discharged, and no bill in equity lies against him to enforce specific performance of the contract. So the above-mentioned case of *Sheppard* v. *Murphy* (3) is an authority that specific performance will be decreed in a Court of Equity against the ultimate purchaser, and we are to consider, independently of the authority of *Street* v. *Morgan*, whether an action at law is not also maintainable at the suit of the seller. If it be not, inasmuch as *Grissell* v. *Bristowe* (1) decides that the jobber is discharged, the seller, under the circumstances of this case, though clearly entitled to enforce the contract against the ultimate purchaser in a Court of Equity, is without any remedy at all at law. And not only has no sound reason been suggested why no such action lies, but the decision that the specific performance of the contract may be enforced in a Court of Equity seems decisive to shew that a contract arises, and between these parties; and if that be so, it follows that an action at law is main-

(1) Law Rep. 4 C. P. 36. (2) Law Rep. 4 Ch. App. 3.
(3) Ir. Rep. 2 Eq. 544.

1869

DAVIS v. HAYCOCK.

tainable for the breach of it. Nor is authority wanting upon this point, for in *Grissell* v. *Bristowe* (1), Cockburn, C.J., expressly says: "When, therefore, the seller adopted the substituted parties as the buyers, and the price was paid by the one and the property transferred by the other, a contract and the relation of vendor and vendee immediately arose between them. In this view alone could the seller be entitled to a specific performance of the contract by the transferees in the execution of the transfers and the registration of the shares, or any indemnity in respect of calls—a right which was held to exist by the Court of Appeal in Equity in Ireland in the case of *Sheppard* v. *Murphy* (2), the circumstances of which were precisely similar to the present—a right which it seems impossible to doubt the seller would have against the transferees under the circumstances, and as to which it is only necessary to say that we entirely concur in the reasoning and conclusion of Lord Justice Christian in the case referred to, to which it seems to us impossible to add anything with advantage."

I am, therefore, of opinion that, upon principle and upon authority, on the acceptance by the seller of the nomination by the jobber of the ultimate purchaser (according to the custom), where he has contracted to purchase, a contract is created between the seller and the ultimate purchaser, for the breach of which an action at law may be maintained; and that upon these grounds the plaintiff is entitled to maintain this action, and to recover from the defendant the amount of calls to which he has become liable.

A question has been raised, whether the contract which has arisen between the plaintiff and defendant is correctly set forth in the declaration. I think that it is, and that the plaintiff may recover upon the count as framed. If a court of error should decide the contrary, the plaintiff will have no right to complain, inasmuch as the Court has offered to amend the declaration in any way that the plaintiff may suggest. He has not availed himself of this permission, and he must therefore be prepared, in the event of an appeal, to abide by the record in its present form.

My Brother Cleasby, if the parties on the one side or the other determine to appeal, withdraws his judgment; and the majority of the Court—that is, my Brother Pigott and myself—being of

(1) Law Rep. 4 C. P. at p. 51. (2) Ir. Rep. 2 Eq. 544.

opinion that the plaintiff is entitled to the judgment of the Court, the judgment will be entered accordingly.

1869

DAVIS v. HAYCOCK.

Judgment for the plaintiff.

Attorneys for plaintiff: *Westall & Roberts.*
Attorney for defendant: *J. W. Nicholson.*

HIGGS *v.* THE NORTHERN ASSAM TEA COMPANY, LIMITED.

SAME *v.* SAME.

July 2.

Company—Assignment of Debentures—Set-off—Assignor and Assignee—Right to set-off against Assignee a Debt due from Assignor.

The plaintiff having sold an estate to the defendants, a limited company, received from them in part payment of the purchase-money a large number of debentures for 100*l.* each, expressed to be payable to him or his assigns. Some of these debentures he afterwards assigned to C. & S., transfers to whom were duly registered. The defendants also issued certificates to C. & S., describing them as "registered proprietors," and in other dealings with them treated them as being in fact such proprietors. After the assignment, but previous to the day fixed for payment of the debentures, and previous to some of the dealings with C. & S. above mentioned, the plaintiff became indebted to the defendants for unpaid calls on shares held by him in their company. The defendants, under their articles of association, had a primary lien on the debentures of any member of the company who might be absolutely or contingently liable to the company in any amount or on any account whatsoever; and, the debentures assigned to C. & S. having become due, the defendants sought, in actions brought against them in the name of the plaintiff to recover the amounts due to C. & S. respectively, to set off the debt due to them from the plaintiff:—

Held, that the defendants had by their original contract with the plaintiff so contracted, and by their subsequent dealings with C. & S. so conducted themselves, as to have lost in equity the right to set off the plaintiff's debt against the claims of C. & S.

THIS was a special case stated for the opinion of the Court in two actions, the first of which was brought in the name of the plaintiff, Edward Hood Higgs, by Henry Cavendish Cavendish to recover 1800*l.* and interest at the rate of 5*l.* per cent. per annum from the 1st of January, 1868, on eighteen debentures of 100*l.* each dated the 2nd of January, 1865; and the second of which was brought in the name of the same plaintiff by George Perceval Smith to recover 1000*l.* and interest thereon at the same rate from

1869

HIGGS v. ASSAM TEA CO.

the same time on ten similar debentures. The facts were as follows:—

On the 17th of October, 1864, an agreement was made between the plaintiff E. H. Higgs and Edmund Walter Wingrove on behalf of a company called the Northern Assam Tea Company, Limited, which contained the following among other clauses:—

"1. The said E. H. Higgs, his executors, &c., and all necessary parties, shall sell and transfer, and the said Edmund Walter Wingrove shall purchase, the estates and properties mentioned in the schedule hereunder written, all situate in the district of Dibrooghur, in the province of Upper Assam, for the sum of 54,000*l.* of sterling English money, to be paid as hereinafter mentioned; such sum of 54,000*l.* to be divided into two amounts in the manner mentioned hereunder.

"6. The said purchase money of 54,000*l.* shall consist of 7000*l.* in cash to be paid on or before the 15th of November next, and the sum of 47,000*l.* in debenture bonds at the rate of 5*l.* per cent. per annum from the 1st of January, 1865, such debentures to be delivered to the said E. H. Higgs on the completion of the transfer of the estate at Assam as he may direct, and to be redeemable and paid as follows: 8000*l.* on the 1st of January, 1868; 10,000*l.* on the 1st of January, 1869; 14,000*l.* on the 1st of January, 1870; 15,000*l.* on the 1st of January, 1871; but the said E. H. Higgs shall have a lien for the unpaid purchase money and interest on the said land and premises so long as any part thereof shall remain unpaid.

"12. [Guarantee by the said E. H. Higgs of net annual profits of the said company up to a certain amount for the first three years after registration; with power to the directors to retain a reasonable number of the said debentures as security, the company to have a lien upon such debentures in respect of any deficiency of profits.]"

The defendants were completely formed and registered, and became incorporated under the Companies Act, 1862, on the 22nd of October, 1864. Their articles of association contain the following amongst other provisions:—

"3. The agreement lately made and entered into between E. H. Higgs of the one part, and E. W. Wingrove, acting for and

on behalf of the Northern Assam Tea Company, Limited, of the other part [being the agreement above set forth], is hereby confirmed, and the provisions thereof, so far as they are applicable to the company, are incorporated in and shall be deemed to be and shall be construed as part of these articles without prejudice to the powers hereinafter conferred upon the directors to alter and vary the same if they shall think fit to do so.

"18. The company shall have a primary lien upon the share or shares, debenture or debentures, and dividends or profits of any member who may be either absolutely or contingently indebted or liable to the company in any amount and on any account whatsoever, and that whether such member is liable or indebted solely or jointly with any other person or persons, and whether the debt be actually payable or not. And the board of directors may, after any such debt has become actually payable, absolutely sell, dispose of, and transfer all or any one or more of the shares or debentures of any member so indebted or liable to them as aforesaid, and may apply the proceeds of such sale in or towards the payment or satisfaction of the said debt or liability, and the consent of any such member shall not be necessary for giving validity to such sale, disposition, or transfer; and the purchaser of any such share or shares, debenture or debentures, shall not be bound to ascertain whether such power of sale shall have arisen, and a resolution of such board that such sale shall be made, and the entry of the name of the purchaser in the company's share register as the holder of such share or debenture shall as well confer a good title both at law and in equity on the purchaser against such member and all other persons whatsoever, as also exempt the purchaser from all liability in respect of his purchase money; and any such member so indebted or liable as aforesaid shall on demand by or on behalf of such board deliver up to such board or to its appointed agent each and every of the certificates of shares, debenture or debentures, which such member shall hold in respect of such share or shares, debenture or debentures, so sold and disposed of as aforesaid; and any such member neglecting to deliver up such certificate or debenture as aforesaid for seven days after such demand as aforesaid shall be deemed to have wrongfully converted them, and shall become and be liable to pay substantial damages to the company

1869

HIGGS v. ASSAM TEA CO.

in respect thereof in any action to be commenced by this company for that purpose.

"49. The directors may, if they see fit to do so, pay out of the capital of the company interest on sums paid up on shares in advance of calls, or on debentures given for purchase of the estate or otherwise." [It was further provided that the directors should have the control of the general business of the company, and full power to carry out the agreement above set forth.]

On the 4th of April, 1865, the purchase of the tea estates mentioned in the agreement of the 17th of October, 1864, was completed by the plaintiff executing the conveyance to the company, and the whole of the debentures mentioned in that agreement were subsequently issued by the defendants to the plaintiff, with the exception of the 150 for 100*l.* each, payable on the 1st of January, 1871, which were retained by the defendants under the twelfth clause of the agreement as a security for the performance by the plaintiff of the stipulation of the said clause.

The eighty debentures payable on the 1st of January, 1868, were all in the same form. They recited the agreement between Higgs and the defendants, and witnessed that the defendants bound themselves to pay the principal sums and interest to "E. W. Higgs, his executors, administrators, or assigns." The other debentures were similar to these, with the exception of the day fixed for payment.

On the 28th of July, 1865, the plaintiff, in consideration of 1850*l.*, by deed transferred to Henry Cavendish Cavendish twenty of the said debentures, payable on the 1st of January, 1868. Cavendish then was and from thence hitherto has been, and still is, a shareholder in the defendants' company.

The following is the form of deed of transfer:—"I, Edward Hood Higgs, in consideration of the sum of 1850*l.* paid to me by Henry Cavendish Taylor [now Henry Cavendish Cavendish], do hereby transfer to the said Henry Cavendish Taylor, his executors, administrators and assigns, certain debenture bonds numbered 61 to 80, made by the Northern Assam Tea Company to the said Edward Hood Higgs, bearing date the 2nd day of January, 1865, for securing the sum of 2000*l.* and interest, and all my rights, estate and interest in and to the money thereby secured. In witness whereof," &c.

On the 9th of August, 1865, Cavendish gave notice of this transfer to the defendants, and sent in to them the deed of transfer for registration, and the transfer was registered by the defendants in a book kept by them for registering mortgages, and called the register of mortgages, as transferred from the plaintiff Higgs to Cavendish, and they delivered to Cavendish a certificate, dated the 9th of August, 1865, that he had that day been entered on the register of mortgages as the "registered proprietor" of twenty debenture bonds of 100*l.*

On the 3rd of October, 1866, the plaintiff, in consideration of 1020*l.* then paid to him by George Percival Smith, transferred to him twelve other of the first series of bonds for 100*l.* by a similar deed of transfer. Smith then was, and from thence hitherto hath been, and still is, a shareholder in the defendants' company.

On the 16th of October, 1866, Smith gave notice of the said transfer, and sent the said deed to the defendants, and was entered on the register of transfers, and received from the defendants a certificate in a similar form to the certificate given to Cavendish, certifying that he was the "registered owner" of the said debentures.

The defendants paid the interest on the debentures to Cavendish and Smith respectively, from the times the transfers were registered until the 1st of January, 1868. In November and December, 1867, letters were written by the secretary of the defendants to Cavendish and Smith, acknowledging each of them to be the owners of the debentures respectively transferred to them, and soliciting further time for payment.

In January, 1868, the defendants proposed to accept and accepted from Cavendish two of the debentures transferred to him, and from Smith two of the debentures transferred to him, in payment of an equal amount to that of the principal moneys in the said debentures due from each of them to the defendants for calls on the shares held by each of them in the defendants' company, i.e., 200*l.* from Cavendish, and 200*l.* from Smith.

Neither Cavendish nor Smith at the times when the debentures were transferred, had any notice that the defendants had or would claim any right of set-off or lien as against or on the said debentures or any of them.

1869

HIGGS v. ASSAM TEA CO.

24 L.D.91

On the 23rd of February, 1866, by a deed of mortgage between the defendants of the one part and the plaintiff of the other part, after reciting amongst other things the agreement of the 17th of October, 1864, and the indenture of the 4th of April, 1865, whereby the plaintiff conveyed the said tea estates to the defendants, in the manner and for the considerations therein mentioned, and that the plaintiff had requested the defendants, in performance of their said recited agreement for giving him a lien for his unpaid purchase-money and the interest thereof on the said lands, to execute to him, the plaintiff, the mortgage thereinafter expressed for the benefit of himself and his assigns, the holders for the time being of the said several debentures, the defendants granted to the plaintiff the land therein mentioned, to hold to the plaintiff upon the trusts and subject to the proviso for redemption and reassignment, and other the provisions and declarations thereinafter contained. And it was thereby provided that if the defendants should pay the respective holders for the time being of the said several debenture bonds so issued by the defendants the several sums of principal money secured thereby respectively, with the interest thereon respectively, at the rates therein respectively specified at the several and respective times, and in the respective manner, by the said respective debenture bonds respectively provided, then and at any time after such payment should have been so made, the plaintiff should re-convey the said land to the defendants; and the said deed also contained a power for the plaintiff to sell the lands, &c., in the event of the defendants failing to pay the said debentures as therein mentioned, and it was declared that he should hold the proceeds in trust after payment of expenses, to pay to the holders for the time being of such of the said debentures as should for the time being be unpaid, the amounts secured to them respectively, rateably and pari passu without preference or priority, according to the amounts secured thereby respectively.

The plaintiff, by deed bearing date the 4th of October, 1866, covenanted with the defendants that he, the said plaintiff, his executors, &c., would punctually pay the calls for the time being to be made on 2000 shares therein mentioned. Various calls were duly made in June, 1867, and August, 1867, on the said shares,

1869

HIGGS v. ASSAM TEA CO.

but the plaintiff did not pay the same. The plaintiff was also at the commencement of this suit indebted to the defendants for unpaid calls on other shares of which he was the registered owner, and for money lent and paid by the defendants for him at his request.

The defendants now claimed to set off as against Cavendish & Smith the sums due to them for such unpaid calls, &c., from Higgs, and the question for the opinion of the Court was whether they were entitled so to do.

June 24. *J. Brown, Q.C.* (*R. F. Stone* with him), for the plaintiff, contended that the defendants could have no set-off against Cavendish & Smith in respect of a debt due to them from Higgs. The bonds were, on the face of them, intended to be assigned, and the assignees had been duly registered and dealt with by the defendants as proprietors. Under all the circumstances a Court of Equity would grant a perpetual and unconditional injunction against the defendants being at liberty to plead this set-off. *Pickard* v. *Sears* (1); *Watson* v. *Mid-Wales Railway Company* (2); *Re Bahia and San Francisco Railway Company* (3); *Dickson* v. *Swansea Vale Railway Company* (4); *Jeffryes* v. *Agra Bank* (5); *Re Blakely Ordnance Company* (6); *Re General Estates Company.* (7)

Mellish, Q.C., for the defendants, contended that the defendants had not, either by the form of the debenture bonds, or by their dealing with Cavendish & Smith, lost the right to take advantage of the ordinary rule that the assignee of a chose in action takes it, subject to all the equities existing between the original parties to the contract: *Mangles* v. *Dixon* (8); *In re Natal Investment Company* (9); *Ryall* v. *Rowles* (10); *Rawson* v. *Samuel.* (11)

J. Brown, Q.C., in reply, cited *Cockrane* v. *Green.* (12)

Cur. adv. vult.

(1) 6 Ad. & E. 469.
(2) Law Rep. 2 C. P. 593.
(3) Law Rep. 3 Q. B. 584.
(4) Law Rep. 4 Q. B. 44.
(5) Law Rep. 2 Eq. 674.
(6) Law Rep. 3 Ch. App. 154.
(7) Law Rep. 3 Ch. App. 758.
(8) 3 H. L. C. 702.
(9) Law Rep. 3 Ch. App. 355.
(10) 2 White & Tudor L. C. 2nd ed. 615.
(11) 1 Cr. & Ph. 161.
(12) 9 C. B. (N. S.) 448.

1869

HIGGS v. ASSAM TEA CO.

July 2. The judgment of the Court (Bramwell and Channell, BB.) was delivered by

BRAMWELL, B. We are to consider these cases, not on the pleadings, but as special cases.

The question in them is the same as would arise if Messrs. Cavendish & Smith had brought suits in their own names in equity against the defendants, and the defendants had set up the defence they now set up of a legal set-off. Would there be what is called an equity to prevent their doing so—that is, taking the set-off to be available at law, would equity restrain the defendants from relying on it? This is obviously a purely equitable question, and our answer must be given with great distrust, the more so owing to the state of the authorities. The set-off is a set-off in law. Have the defendants so contracted, or conducted themselves, that they cannot avail themselves of it? The equity, if any of Messrs. Cavendish & Smith to restrain the set-off, is an equity between them and the defendants. For we presume that if it should appear these debentures were to be paid to assignees of them without the right of set-off—still, if Higgs himself sued, a set-off would be available against him.

But, though it is an equity between the assignees of the debentures and the defendants, it is an equity which may arise out of the original contract with Higgs. For if the contract with him was to pay his assignees without right of set-off, then the assignees have an equity to prevent a set-off being enforced against them. Further, if, whatever may have been the original contract with Higgs, the defendants have so conducted themselves to the assignees, that it would be inequitable for the defendants to set up such set-off, then also such an equity exists in the assignees. We have to consider then, whether by the original contract with Higgs, or by their subsequent dealing with Messrs. Cavendish & Smith, or by both combined, the defendants are precluded from defending themselves by this set-off due from Higgs.

In considering this question it is impossible to doubt that both Higgs and the defendants contemplated that these debentures would be sold and assigned. Their amount, 47,000*l.*, or 32,000*l.* less the 15,000*l.*, the defendants were to retain, their being issued in separate debentures of 100*l.* each instead of one bond or covenant

being given, the subsequent registration of them, and the issuing of certificates to Messrs. Cavendish & Smith, stating them to be proprietors of the debentures; in short, the entire dealing and conduct in relation to these debentures, shew the parties contemplated they would be sold and assigned. The provision in article 18 seems decisive,—the company may sell the debentures of an indebted member; but that cannot mean subject to a set-off against him—otherwise the debenture of A. might be sold to B., and then payment refused to B. because A. was still indebted to the company. So, under s. 12, the company were to retain a reasonable number of Higgs' debentures, and have a lien on them to secure Higgs' guarantee as to profit. It cannot be supposed that, if they sold these debentures under this lien, the assignees would take them subject to Higgs' debts for calls. Further, the mortgage is expressly in trust for the "holders for the time being" of the debentures unpaid. Both parties, therefore, must have contemplated their debentures would be assigned. But, as they could not practically be sold and assigned if subject to an uncertain set-off against Higgs, both he and the defendants must have intended that in the hands of transferees they should not be subject to that set-off.

These considerations and the cases of *Jeffryes* v. *Agra Bank* (1), *In re Blakely Ordnance Company* (2), and *In re General Estates Company* (3), would seem sufficient for us to decide this case in favour of the plaintiff, but it is said a difficulty is created by the case of *In re Natal Investment Company.* (4) By that case, of course, we are bound. But it was not a case of set-off, but of failure of consideration for the debenture assigned. It was decided on its own facts, and assuming it to be well decided, it did not overrule *In re Blakely Ordnance Company* (2); see per Wood, L.J., *In re General Estates Company.* (3) In the present case there is, what did not exist in any of the four cases referred to, the dealing of the defendants with the assignees of the debentures. As we have observed, they register them as proprietors, they give them certificates that they are registered "proprietors" of the debenture bonds. In November and December, 1867, after the debt from Higgs was due, they

(1) Law Rep. 2 Eq. 674.
(2) Law Rep. 3 Ch. App. 154.
(3) Law Rep. 3 Ch. App. 758.
(4) Law Rep. 3 Ch. App. 355.

1869

HIGGS v. ASSAM TEA CO.

wrote letters to Messrs. Cavendish & Smith acknowledging each of them to be owners of the debentures respectively transferred to them, soliciting further time for payment; and in January, 1868, after the debentures are due they accept from them debentures in payment of an equal amount of calls due from them. Mr. Mellish said all this was no more than they were bound to do, even with the right of set-off, and cited *Mangles* v. *Dixon*. (1) It is impossible not to agree with the admirable reasoning of Lord St. Leonards in that case, and it is true that a debtor cannot refuse to receive from the assignee of a debt notice of the assignment—and it is true he is not bound to tell him that that debt is subject to equities, not apparent on its face, so to say. But there is more in this case —Messrs. Cavendish & Smith are called by the defendants "proprietors" of the debentures. In truth, the defendants now say that there is no beneficial property in them, or that they are not absolute proprietors of them, but qualified proprietors subject to a right in the defendants. Then they treat the debentures, as to those they take, as being due to their full amount, and negotiate for time to pay a debt which they now say they practically do not owe. *Watson* v. *Mid-Wales Railway Company* (2) was relied on by the plaintiff, and certainly the reasoning of the judges seems in point for him. But the bond sued on was made before the contract out of which the set-off arose; but whether it was assigned and notice of the assignment given to the defendants before the making of that contract, or only before the rent set off became due, does not appear. According to the argument of the plaintiff's counsel the latter is the case. If so, the case is in point. *Dickson* v. *Swansea Vale Railway Company* (3) seems also in point.

On these authorities, and taking all the above matters into account, we hold that the defendants and Higgs contemplated and intended that Higgs should assign these debentures, that he could not practically do so if subject to such equities as now set up—that consequently Higgs and the defendants contemplated and intended that Higgs should assign free from those equities, and that the defendants have dealt with Messrs. Cavendish & Smith

(1) 3 H. L. C. 702. (2) Law Rep. 2 C. P. 593.
(3) Law Rep. 4 Q. B. 44.

on that footing. Holding this, and guiding ourselves as we best can by the cases cited, we think the plaintiff entitled to our judgment.

1869

HIGGS v. ASSAM TEA CO.

Judgment for the plaintiff.

Attorney for plaintiff: *A. E. Francis.*
Attorneys for defendants: *Hamber & Harrison.*

END OF TRINITY TERM, 1869.

INDEX.

ABSTRACTION OF WATER — Infringement of right—Damage - - - 43
See INFRINGEMENT OF RIGHT.

ACT OF BANKRUPTCY—Fraudulent delivery of goods - - - - 159
See FRAUDULENT DELIVERY OF GOODS.

AIR—Easement—Prescription Act, s. 3—Actual enjoyment - - - - 126
See LIGHT AND AIR.

APPLICATION OF PENALTIES—*Borough Justices—Separate Commission of the Peace—Construction of Statute—Preamble restraining Enactment*—11 & 12 *Vict. c.* 43, *s.* 31—9 *Geo.* 4, *c.* 61, *s.* 26—24 & 25 *Vict. c.* 75, *s.* 4.] Where justices of a borough, which has a separate commission of the peace, but not a separate court of quarter sessions, in the exercise of their summary jurisdiction, impose penalties for offences against the general law, they act for the county, and the penalties must, under 11 & 12 Vict. c. 43, s. 31, be paid over by their clerk to the treasurer of the county or place to the quarter sessions of which the appeal from their decision lies; and it makes no difference that the borough has a separate commission of the peace.—The 4th section of 24 & 25 Vict. c. 75, which declares that in the Alehouse Licensing Act (9 Geo. 4, c. 61) the words "county or place" include any borough having a separate commission of the peace, though not a separate court of quarter sessions, only applies to the power of granting and withdrawing licences contained in that Act, and does not affect the application of penalties fixed by its 26th section. WINN *v.* MOSSMAN - - - 292

APPLICATION QUIA TIMET—*Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134)—*Creditors' Deed—Process not available under s.* 198—*Staying Proceedings.*] The defendant, being sued by a creditor, before trial, but not in time to plead it to the action, registered a deed under the Bankruptcy Act, 1861. The plaintiff recovered judgment; and, without obtaining leave from the Court of Bankruptcy, issued execution; but before it had been enforced the defendant applied to this Court to stay proceedings.—The Court refused to interfere, although it appeared that the writ was about to be immediately executed. HARDING *v.* INSKIP 80

ARBITRATION—Case stated—Practice - 187
See CASE STATED BY ARBITRATOR.

ARREST—Creditors' deed pleadable but not pleaded
See DEED PLEADABLE NOT PLEADED. [331

—— Privilege — Recognizance — Appearance at hearing - - - - 131
See PRIVILEGE FROM ARREST.

"AS SECRETARY"—Signature—Promissory note—Personal liability - - 102
See SIGNATURE IN REPRESENTATIVE CHARACTER.

ASSENTS TO CREDITORS' DEED — *Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134), *s.* 192—*Conveyance of Property—Bills of Sale Act*, 1854 (17 & 18 *Vict. c.* 36), *ss.* 1, 7—*Signature by Clerk—Authority to sign.*] Assents to a deed under s. 192 of the Bankruptcy Act, 1861, must be absolute and unqualified.—It does not prevent the operation of a deed as a conveyance at common law, that it is expressed to be intended to operate as a deed under s. 192 of the Bankruptcy Act, 1861, and that not being duly assented to, it cannot so operate.—A judgment debtor, anticipating the immediate levy of execution, executed an assignment of all his property to a trustee, who joined with him in a covenant to pay a composition of 2*s.* in the pound to his creditors, and who was to hold the property on trust, first, to pay the costs; secondly, to repay himself the money paid by him in respect of the composition, with an ultimate trust of the surplus (if any) for the debtor. The deed was expressed to be intended to operate under s. 192 of the Bankruptcy Act, 1861.—A necessary assent appeared on its face to be given by one creditor on behalf of himself and three others, *without prejudice to their rights under a former trust deed.* The assent was actually signed by a clerk of the creditor's town agents, the creditor having telegraphed to them to sign for himself and the other three; it did not appear that the limitation in the assent was required by the telegraphic instructions:—*Held*, that, although the signature by the clerk was otherwise a valid signature on behalf of these creditors, yet the assent was not valid, because it was not absolute and unqualified, and also because it did not appear to be in pursuance of the instructions:—*Held*, also, that, notwithstanding the deed appeared on its face to be intended to operate under s. 192 of the Bankruptcy Act, 1861, it could not be taken to be an escrow; and that, although in that respect it could not

ASSENTS TO CREDITORS' DEED—*continued.*
operate as was intended, it conveyed the property comprised in it to the trustee. JOHNSON *v.* OSENTON - - - - - - - 107

ASSIGNEE OF LEASE—Covenant running with land - - - - - - 311
See COVENANT RUNNING WITH LAND.

ASSIGNEE OF REVERSION—Covenant running with land—Offence against game laws 20
See CONDITION RUNNING WITH LAND.

ASSIGNMENT OF DEBENTURES — *Company — Set-off—Assignor and Assignee—Right to set off against Assignee a Debt due from Assignor.*] The plaintiff having sold an estate to the defendants, a limited company, received from them in part payment of the purchase-money a large number of debentures for 100*l.* each, expressed to be payable to him or his assigns. Some of these debentures he afterwards assigned to C. & S., transfers to whom were duly registered. The defendants also issued certificates to C. & S., describing them as "registered proprietors," and in other dealings with them treated them as being in fact such proprietors. After the assignment, but previous to the day fixed for payment of the debentures, and previous to some of the dealings with C. & S. above mentioned, the plaintiff became indebted to the defendants for unpaid calls on shares held by him in their company. The defendants, under their articles of association, had a primary lien on the debentures of any member of the company who might be absolutely or contingently liable to the company in any amount or on any account whatsoever; and, the debentures assigned to C. & S. having become due, the defendants sought, in actions brought against them in the name of the plaintiff to recover the amounts due to C. & S. respectively, to set off the debt due to them from the plaintiff:—*Held*, that the defendants had by their original contract with the plaintiff so contracted, and by their subsequent dealings with C. & S. so conducted themselves, as to have lost in equity the right to set off the plaintiff's debt against the claims of C. & S. HIGGS *v.* THE NORTHERN ASSAM TEA COMPANY. SAME *v.* SAME - - 387

AUTHORITY—Assents to creditors' deed—Signature - - - - - - 107
See ASSENTS TO CREDITORS' DEED.

AWARD—Land taken compulsorily—Conveyance
See LAND TAKEN COMPULSORILY. [309
—— Money had and received—Mistake - 189
See MISTAKE.

BANKRUPTCY ACT, 1861, s. 192 - - 9, 107
See ASSENTS TO CREDITORS' DEED.
EQUITABLE PLEA OF CREDITORS' DEED.
—— ss. 192, 198 - - - 80, 331
See APPLICATION QUIA TIMET.
DEED PLEADABLE NOT PLEADED.

BILL OF LADING—Special indorsement - 58
See SPECIAL INDORSEMENT OF BILL OF LADING.

BILL OF SALE—Payment on demand - 13
See PAYMENT ON DEMAND.

BILLS OF SALE ACT, 1854, ss. 1, 7 - 107
See ASSENTS TO CREDITORS' DEED.

BOROUGH JUSTICES—Application of penalties
See APPLICATION OF PENALTIES. [292

CALLS—Sale of shares—Custom of Stock Exchange - - - 81, 203, 373
See CUSTOM OF STOCK EXCHANGE. 1, 2, 3.

CARRIAGE, HACKNEY—Railway station—"Public street or road" - - - 319
See HACKNEY CARRIAGE.

CASE STATED BY ARBITRATOR — *Practice — Error.*] An arbitrator to whom a cause was referred, was required by the order of reference to state a case for the opinion of the Court of Exchequer, at the request of either party; he stated a case accordingly, which was heard and decided by the Court:—*Held*, that this decision was not a judgment on which error could be brought.—*Gumm* v. *Fowler* (2 E. & E. 890; 29 L. J. (Q.B.) 189) followed. COURTAULD *v.* LEGH - 187

CASES—*Cotton* v. *James* (1 Moo. & M. 273) followed - - - - 159
See FRAUDULENT DELIVERY OF GOODS.
—— *Cragg* v. *Taylor* (Law Rep. 2 Ex. 131) distinguished - - - - 154
See CHARGING ORDER.
—— *Foy* v. *London, Brighton, and South Coast Railway Company* (18 C. B. (N.S.) 225) commented on - - - 117
See TRAIN TOO LONG FOR PLATFORM.
—— *Gray* v. *West* (4 Q. B. 175) commented upon
See DAMAGES NOT EXCEEDING 10*l.* [146
—— *Gumm* v. *Fowler* (2 E. & E. 890; 29 L. J. (Q.B.) 189) followed - - 187
See CASE STATED BY ARBITRATOR.
—— *Hare* v. *Hyde* (16 Q. B. 391; 20 L. J. (Q.B.) 185) distinguished - - - 131
See PRIVILEGE FROM ARREST.
—— *Ive* v. *Scott* (9 Dowl. 993) commented on
See MESNE PROFITS. [92
—— *Reg.* v. *Cooper* (8 Q. B. 533) commented on
See PUBLICATION OF LIBEL. [169
—— *Wood* v. *Tate* (2 B. & P. (N.R.) 247) followed - - - - 162
See TENANCY FROM YEAR TO YEAR.

CERTIFICATE—Registration of creditors' deed—Execution - - - - 331
See DEED PLEADABLE NOT PLEADED.

CHAPEL — Parish church—Ownership—Pews—Prescription—Evidence - - 273
See PRIVATE CHAPEL.

CHARGE OF INGRATITUDE—*Libel—Explanation of Grounds of Charge.*] To charge a man with ingratitude is libellous; and such a charge may also be libellous, notwithstanding that the facts, upon which it is founded, are stated, and they do not support the charge.—Per Kelly, C.B.:—An untrue statement that a person was at a past time in pecuniary difficulties may be libellous, although it is also stated that these difficulties have been surmounted. COX *v.* LEE - 284

CHARGING ORDER—*Interest in Produce of Stock and Shares*—1 & 2 *Vict. c.* 110, *s.* 14—3 & 4 *Vict. c.* 82, *s.* 1.] A testatrix gave her whole estate and effects, which included stock and shares, to trustees; on trust to pay debts and legacies, and as to the residue of her estate and effects, upon trust for the defendant and two other persons; and she directed her trustees to pay the legacies so soon after her decease as her means could be judiciously converted into cash, and in any event not later

CHARGING ORDER—*continued.*
than twelve months after her decease. A charging order having been made upon the stock and shares, to the extent of the defendant's interest therein, in favour of a judgment creditor:—*Held*, that the defendant having no interest in the stock and shares, but only an interest in their produce after performance of the prior trusts, they could not be charged with his judgment debt under 1 & 2 Vict. c. 110, s. 14, or 3 & 4 Vict. c. 82, s. 1. *Cragg* v. *Taylor* (Law Rep. 2 Ex. 131) distinguished. Dixon *v.* Wrench - - - - 154

CHARTERPARTY—Construction—Full and complete cargo—"Baltic" printed rates 73
See Full and Complete Cargo.

CHEQUE—Notice of dishonour—No effects 313
See Notice of Dishonour.
—— Payment—Presentment—Delay—Laches
See Payment by Cheque. [268

CHURCH—Private chapel—Ownership—Pews—Evidence - - - - 273
See Private Chapel.

CHURCHWARDENS—*Minister's Stipend—Payment out of Pew Rents—Right to Payment out of Pew Rents paid in advance—Mode of Payment of Stipend*—58 *Geo.* 3, *c.* 45, *s.* 73—59 *Geo.* 3, *c.* 134, *s.* 26—*Right of Action—Trustee and Cestui que Trust—Liability of Churchwardens for Money received by their Predecessors.*] By the 58 Geo. 3, c. 45, s. 73, churchwardens of district churches are appointed, who "shall collect and receive the rents of the seats and pay the stipends or salaries assigned by the Commissioners (under the Act) to be paid to the minister and clerk;" and by the 59 Geo. 3, c. 134, s. 26, the commissioners are empowered to direct the pew rents of any church built under the provisions of 58 Geo. 3, c. 45, or of that Act to be assigned to the district and received by the churchwardens in such district, "who shall thereupon be required to pay the stipend which from time to time may be assigned, under the provisions of this Act, to the minister or clerk":—*Held*, that these enactments constitute not merely the relation of trustees and cestui que trust between the churchwardens and the minister, but also that they impose on the churchwardens the legal and absolute duty of paying over the pew rents applicable to the minister's stipend as soon as they are received, and that the minister has therefore a right of action at law on the statute, or for money received against the churchwardens, in the event of their not performing that duty.—The plaintiff was, as the minister of a district church, entitled to receive out of pew rents from the defendants, the churchwardens, a stipend of 55*l.* a year under a deed of assignment duly executed by the commissioners, whereby that sum was assigned to the minister of the church, and was ordered to be paid from Christmas, 1826, on the "four most usual feast-days, viz., Michaelmas Day, Christmas Day, Lady Day, and Midsummer Day, in even and equal portions." The deed also provided that the stipend should in no case exceed the amount produced by the pew rents in any one year. At Michaelmas, 1867, two quarters were due, amounting to 27*5l.*, which the plaintiff claimed of the defendants. They had in and, at the commencement of the action, in October, 1867, only 19*9l.* 10*s.* 10*d.*, of which 12*0l.* 5*s.* 6*d.* was made up wholly of pew rents paid in advance for the occupation of pews after Michaelmas. This sum of 12*0l.* 5*s.* 6*d.* being insufficient to meet the then accruing quarter's stipend, they refused to pay over to the plaintiff:—*Held*, that under the terms of the assignment and the circumstances of the case the plaintiff was not entitled to receive from the defendants, in respect of his stipend for the quarters previous to Michaelmas, money paid in advance for the occupation of pews after Michaelmas.—The defendants' predecessors had retained a part of the money received by them for pew rents during their term of office:—*Held*, that the plaintiff could not recover from the defendants the amount so retained by their predecessors. Lloyd *v.* Burrup - - - - - 63

CITY OF LONDON SEWERS ACT, 1848 (11 *& 12 Vict. c. clxiii.*)—*Compensation—Public Works—Lands Clauses Act*, 1845 (8 *Vict. c.* 18), *s.* 68.] The City of London Sewers Act, 1848, by s. 2 incorporates the Lands Clauses Act, 1845; but s. 3 excludes the operation of those provisions of the Lands Clauses Act which relate to "the purchase and taking of lands otherwise than by agreement;" and those words are the descriptive heading of ss. 16—68 of that Act. Compensation was given by the special Act in certain special cases of injury to, and interference with, property; but no compensation was given for the injurious affecting of lands generally. The plaintiff, whose premises were injuriously affected by works executed by the defendants under the powers of the local Act, claimed compensation under s. 68 of the Lands Clauses Act:—*Held*, reversing the judgment of the Court below, that s. 68 of the Lands Clauses Act was not incorporated in the local Act.—*Quære*, whether, if s. 68 of the Lands Clauses Act had been incorporated, compensation could have been claimed under it, the plaintiff not being entitled to compensation by any other statutory provision. Ferrar *v.* The Commissioners of Sewers of London - - Ex. Ch. 227; s. c. in Ex. 1

COLLISION—Compulsory pilotage - - 238
See Compulsory Pilotage.

COMMON LAW PROCEDURE ACT, 1854, s. 60 87
See Examination of Judgment Debtor.
—— ss. 168. 170 - - - - 92
See Mesne Profits.

COMMON SEAL—Corporation—Demise - 162
See Tenancy from Year to Year.

COMPANY—Assignment of debentures - 387
See Assignment of Debentures.
Railway Company.

COMPENSATION—Incorporation of Lands Clauses Act - - - - 5, 227
See City of London Sewers Act, 1848.
—— Nuisances Removal Act, 1855—Sewers 222
See Nuisances Removal Act, 1855.

COMPULSORY PILOTAGE—*Negligence—Collision—Master and Servant—Port of London—Merchant Shipping Act*, 1854 (17 *& 18 Vict. c.* 104)—*General Pilot Act* (6 *Geo.* 4, *c.* 125).] All vessels coming up the Channel to London, are required by s. 378 of the Merchant Shipping Act, 1854, to take a pilot on board at Dungeness, and to put him in charge of the ship.—From Dungeness to London

COMPULSORY PILOTAGE—*continued.*
Bridge is, by s. 370, constituted the Trinity House Pilotage district; but no pilot can be licensed to conduct ships both above and below Gravesend; and the pilotage rates are rates from Dungeness to Gravesend, and not to any intermediate place. —By s. 59 of 6 Geo. 4, c. 125 (the exemptions of which are retained by s. 353 of the Merchant Shipping Act, 1854), vessels being within their own port are exempted from compulsory pilotage. By s. 388 of the Merchant Shipping Act, 1854, "No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law." — The defendants' vessel coming up the Channel to London, took a pilot on board at Dungeness; before reaching Gravesend, whilst the vessel was still under the control of the pilot, she came into collision with the plaintiffs' vessel, through the pilot's negligence. The defendants' vessel belonged to the port of London; and if the port extends to Yantlett Creek, she was at the time of the collision within her own port; if it only extends to Gravesend, she was not within her own port:—*Held*, first, that for pilotage purposes the port of London extends only to Gravesend.—Secondly, that the exemption contained in s. 388 of the Merchant Shipping Act, 1854, does not require that the pilot should be compulsorily employed at the spot where the accident happens, but only that he should have been compulsorily employed within the district where it happens; and that the defendants were therefore within its protection.—Thirdly, that the defendants having been compelled (by s. 378) to put the pilot in charge of the ship, and being also compelled (by s. 333 and Sched. Table U.) to pay him the full rate for navigating the ship from Dungeness to Gravesend, the relation of master and servant was never constituted between them.—*Semble*, that the pilot had the right to insist on being carried to Gravesend, and on piloting the ship during its whole course thither. The General Steam, &c., Company *v.* The British, &c., Company - - **Ex. Ch. 238**

CONDITION RUNNING WITH LAND—*Landlord and Tenant — Assignee of Reversion — Offence against Game Laws—32 Hen. 8, c. 34.*] A lease contained a proviso for re-entry in case the lessee, his executors, administrators, or assigns, or any tenant, undertenant, or occupier of the premises demised, should, at any time during the term thereby granted, be lawfully convicted of any offence against any of the present or future game laws. The occupier of the premises having been convicted of killing game without a game certificate, the assignee of the reversion brought ejectment:—*Held*, that he could not maintain the action.—Per Martin, Channell, and Cleasby, BB., that the assignee of the reversion could not avail himself of the breach of the condition, inasmuch as the condition did not touch or concern the land demised, and therefore did not run with the land.—Per Kelly, C.B., that the offence of which the occupier had been convicted was not an offence against the "game laws" within the meaning of the condition. Stevens *v.* Copp - - - **20**

CONSIGNEE—Liability—Special indorsement of bill of lading - - - **58**
See Special Indorsement of Bill of Lading.

CONSTRUCTION—Charterparty — Full and complete cargo - - - - **73**
See Full and Complete Cargo.
—— Incorporation — City of London Sewers Act, 1848—Lands Clauses Act, 1845 **1, 227**
See City of London Sewers Act, 1848.
—— Local Act—Goods "landed" - - **260**
See Harbour Tolls.
—— Nuisances Removal Act, 1855—Sewers **222**
See Nuisances Removal Act, 1855.
—— Will—Estate tail by implication - **141**
See Estate Tail by Implication.
—— 24 & 25 Vict. c. 75, s. 4—Application of penalties - - - - **292**
See Borough Justices.

CONTRACT—Custom of Stock Exchange **[81, 203, 373**
See Custom of Stock Exchange. 1, 2, 3.

CONVERSION—Money to be laid out in land **345**
See Succession Duty Act.

CONVEYANCE—Execution—Land taken compulsorily - - - - - **309**
See Land taken Compulsorily.
—— Land—Building—Derogation from grant **248**
See Support from Subterranean Water.
—— Property—Bills of Sale Act - - **107**
See Assents to Creditors' Deed.

CORPORATION—Common seal—Demise - **162**
See Tenancy from Year to Year.
—— Examination of directors under Common Law Procedure Act, 1854, s. 60 - **87**
See Examination of Judgment Debtor.

COSTS—Slander—Damages not exceeding 10*l.* **146**
See Damages not exceeding 10*l.*

COUNTY COURT ACT, 1867, s. 5 - - **146**
See Damages not exceeding 10*l.*

COVENANT—Building—Rent - - **248**
See Support from Subterranean Water.
—— Running with land - - **20, 311**
See Condition Running with Land.
Covenant Running with Land.

COVENANT RUNNING WITH LAND—*Landlord and Tenant—Action by Assignee of Lease against Lessor.*] Where in a lease, the lessee having covenanted to use the demised premises as a public-house, the lessor covenants not to build or keep any house for the sale of spirits or beer within half a mile of the demised premises; the lessor's covenant does not run with the land so as to enable the assignee of the lease to sue him upon it. Thomas *v.* Hayward - - - - **311**

CREDITORS' DEED—Assents - - **107**
See Assents to Creditors' Deed.
—— Equitable plea - - - - **9**
See Equitable Plea of Creditors' Deed.
—— Process - - - - - **80**
See Application quia timet.
—— Registration—Execution - - **331**
See Deed Pleadable not Pleaded.

CUSTOM OF STOCK EXCHANGE—*Sale of Shares —Jobber's Liability—Name of Ultimate Purchaser —Carrying over without Ultimate Purchaser's Authority—Contract to indemnify against Calls.*] The

CUSTOM OF STOCK EXCHANGE—*continued.*

plaintiff, on the 24th of May, 1866, through his brokers, sold to the defendant, a jobber on the London Stock Exchange, for the account of the 30th, thirty shares in a company which had stopped payment on the 10th of the same month and closed its transfer books on the 12th. On the 29th, the "name day," the defendant gave to the plaintiff's brokers the name of M. (which he had received from another jobber) as the ultimate purchaser and nominee of the shares. M. had sanctioned the passing of his name for the account of the 15th of May, provided a legal transfer of the shares could be effected; but the shares had been carried over from the 15th to the 30th without his authority; and on the 29th he was in fact, though not to the knowledge of the defendant, no longer a person who had agreed or was bound to purchase shares in the company. The plaintiff had bought the shares resold by him to the defendant from S. the registered holder, but no formal transfer to the plaintiff had been executed. He was, however, under a contract to indemnify S. against any future calls. On the 8th of June a transfer of thirty shares duly executed by S. was tendered to M., but declined by him. Two calls having afterwards been made on the shares sold, the plaintiff, after unsuccessfully applying to M. to pay them, was compelled under his contract with S. to pay them himself, and he now sought to recover the amount so paid from the defendant:—*Held*, that inasmuch as M. had never authorized the carrying over of the shares, and on the 29th of May, the "name-day," had ceased to be a person bound to purchase them, the defendant had not, by passing M.'s name as ultimate purchaser and nominee, relieved himself from liability. Maxted *v.* Paine [81

2. —— *Sale of Shares—Principal and Agent—Ultimate Buyers.*] The plaintiff having through his brokers on the Stock Exchange sold to the defendant, a jobber, ten shares in Overend, Gurney, & Co., Limited, the defendant on the name-day gave to the plaintiff's brokers the name of Goss as the ultimate buyer. No objection was made to the name, and the plaintiff executed a transfer to Goss of the ten shares. It was afterwards discovered that the brokers named on the ticket as the brokers of Goss had been instructed by S. to buy, and had in fact bought, a large number of shares for S. as undisclosed principal. The ten shares in question (the dealings not being for specific shares) were delivered to them as part of the shares so purchased; but the name of Goss was passed in pursuance of S.'s instructions, and according to an arrangement by which Goss, who was a person of no means, consented to allow his name to be passed in consideration of a sum of money paid to him. The purchasing brokers, as well as the defendant, were ignorant of this arrangement. Calls having been made on the shares, which the plaintiff was compelled to pay, and which he was unable to recover from Goss, he brought this action to recover them from the defendant:—*Held* (by Kelly, C.B., and Bramwell and Pigott, BB., Cleasby, B., dissenting), that Goss was an ultimate purchaser within the meaning of that term as applied in the usage of the Stock Exchange; that the defendant had fulfilled

CUSTOM OF STOCK EXCHANGE—*continued.*

his obligation by passing a name to which no objection was taken according to the usage, and that, in the absence of any fraud either in the defendant or in the purchasing brokers, the defendant could not be treated as ultimate buyer himself or be made liable for calls. Maxted *v.* Paine. (Second Action) - - - 203

3. —— *Sale of Shares—Principal and Agent—Ultimate Buyers.*] The defendant purchased through his brokers on the Stock Exchange for the 15th of May, 50 shares in Overend, Gurney, & Co., Limited; and on the name-day (the 14th) his brokers issued a ticket for the shares in his name to the selling jobber. On the 16th the same jobber bought of the plaintiff, through the plaintiff's broker on the Stock Exchange, thirty shares in the same company; and having, in conformity with the usage of the Stock Exchange, divided the defendant's ticket, he handed to the plaintiff's broker, in part performance of his contract, a ticket containing the defendant's name as purchaser of ten shares. The plaintiff's broker having (according to usage) paid to the jobber the sum stated on the ticket, being the price at which the defendant had bought, delivered to the defendant's brokers a transfer to the defendant at that price, duly executed by the plaintiff, together with the share certificates. The defendant's brokers thereupon repaid to the plaintiff's broker the purchase money, which was at their urgent request repaid to them by the defendant, who also received from them and retained the transfer and share certificates, but did not otherwise adopt the contract.—The defendant's purchase of shares was made before the 10th of May, at a substantial price; on that day the company stopped payment, and the plaintiff's shares were sold on the 16th at a discount exceeding the nominal value, that is, the amount paid up on the shares. Up to the 10th a transfer of the shares might have been registered without difficulty, but after that day the directors refused to register transfers.—Two calls having been made on the ten shares, which the plaintiff as registered holder had been compelled to pay, he brought an action against the defendant to recover the amount, alleging a contract by the defendant to purchase the shares of the plaintiff and to indemnify the plaintiff against calls:—*Held*, by Kelly, C.B., and Pigott, B., that the defendant had contracted as alleged, and that he was therefore liable to repay to the plaintiff the calls so paid by him, and that the declaration was rightly framed.—*Held*, also, that the stoppage of payment on the 10th of May made no difference.—By Channell and Cleasby, BB., that no such contract existed as alleged, and therefore (without deciding that the plaintiff had no remedy at law against the defendant) that the plaintiff could not recover upon the declaration as framed. Davis *v.* Haycock - - - - - 373

DAMAGE—Abstraction of water—Infringement of right - - - - - 43
See Infringement of Right.

DAMAGES—Payment on demand—Bill of sale—Reasonable time - - - 13
See Payment on Demand.

DAMAGES NOT EXCEEDING £10—*Costs—County Court Act*, 1867 (30 & 31 *Vict. c.* 142), *s.* 5—*Slander—Practice—Power of Court to refer to their own Proceedings.*] The 30 & 31 Vict. c. 142, s. 5, which enacts that if in *any* action the plaintiff shall recover a sum not exceeding 10*l.* in tort, he shall not be entitled to any costs, unless the judge certify that there was a sufficient reason for bringing the action in a superior court, or the court or a judge shall by rule or order allow such costs, applies to *all* actions, whether capable of being commenced in a county court or not.—In an action for slander the plaintiff recovered 5*l.* damages in a superior court. On an application for a rule for costs:—*Held*, that inasmuch as he had *necessarily* brought his action in a superior court, and had recovered an amount of damages sufficient, in the absence of evidence to the contrary, to warrant the inference that his conduct in bringing it was neither frivolous nor vexatious, he was entitled to a rule for costs under 30 & 31 Vict. c. 142, s. 5.—*Gray* v. *West* (Law Rep. 4 Q. B. 175) commented on.—The Court has at all times power to look at its own records, and to take notice of their contents, although they may not be formally brought before the Court by affidavit. Craven *v.* Smith - 146

DEBENTURES—Assignment - - 387
See Assignment of Debentures.

DEBTOR AND CREDITOR: *See* Creditors' Deed.

DEED: *See* Creditors' Deed.

DEED PLEADABLE NOT PLEADED—*Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134), *ss.* 192, 198—*Sheriff—Action for not Arresting—Certificate of Registration of Deed of Arrangement—Protection against Execution.*] To a declaration for not executing a writ of ca. sa. against a debtor, the defendants pleaded that they had not arrested the debtor, because subsequently to the accrual to the plaintiffs of the claim for which the judgment in the declaration mentioned was recovered and the writ of ca. sa, issued, and before the delivery of the writ to the defendants, the debtor had executed a deed of arrangement under the Bankruptcy Act, 1861, s. 192, and obtained a certificate of its registration, whereof the defendants had notice. The plaintiffs replied, that the said deed was a deed executed before the commencement of the action, and contained a release, and (if valid) might have been, but was not, pleaded in bar of the action, and that the judgment was signed for want of a plea, and the deed was not assented to by the required number of creditors, and was null and void; of all which the defendants had notice:—*Held*, on demurrer, a good replication. Godwin *v.* Stone 331

DEFAMATION: *See* Libel.

DELAY—Presentment of cheque—Laches - 268
See Payment of Cheque.

DEMAND—Payment—Bill of sale - - 13
See Payment on Demand.

DEMISE—Corporation—Common seal - 162
See Tenancy from Year to Year.

DIRECTORS—Examination under Common Law Procedure Act, 1854, s. 60 - 87
See Examination of Judgment Debtor.

DISHONOUR, NOTICE OF: *See* Notice of Dishonour.

DISTURBANCE OF FISHERY—Several fishery
See Several Fishery. [361

DISTURBANCE OF MARKET—*Municipal Corporations Act* (5 & 6 *Wm.* 4, *c.* 76), *s.* 8—*Limits of Borough.*] In boroughs, the limits of which for the purposes of parliamentary representation have been fixed by 2 & 3 Wm. 4. c. 64, s. 35, sched. O., and which are included in the 1st section of schedules A. & B. to the Municipal Corporations Act (5 & 6 Wm. 4, c. 76, s. 7), all places within the limits so fixed, are by s. 8 of the latter Act, parts of the borough for all purposes; and an ancient borough market may be lawfully held within such limits, although outside the limits of the old municipal borough. A market held in the same town with an old market, if held upon the same day, is a disturbance by intendment of law, but if it is held on a different day it is only evidence of disturbance for the jury. To support an action for disturbance of a market, it is not necessary that the defendant should have actually sold; any active interference by him in the conduct of the new market, or participation in its profits or risk, is sufficient. Mayor, &c., of Dorchester *v.* Ensor - - - - - - 335

DYING WITHOUT ISSUE—Will—Construction—Estate tail by implication - 141
See Estate Tail by Implication.

EASEMENT—Light and air—Prescription Act, s. 3—Actual enjoyment - - 126
See Light and Air.

—— Support from subterranean water - 248
See Support from Subterranean Water.

EJECTMENT—Costs—Practice - - 92
See Mesne Profits.

ENJOYMENT—Easement—Light and air—Prescription Act - - - 126
See Light and Air.

EQUITABLE PLEA OF CREDITORS' DEED—*Deed under Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134), *Schedule D.*] A deed made in the form of Schedule D to the Bankruptcy Act, 1861, and registered under s. 192, cannot be pleaded as an equitable plea to an action of debt by a non-assenting creditor. Wright *v.* Jelley - 9

ERROR—Case stated by arbitrator—Practice 187
See Case Stated by Arbitrator.

ESTATE TAIL BY IMPLICATION—*Will—Construction—Presumption—Dying without Issue.*] By a will made before the passing of the Wills Act (1 Vict. c. 26), the testator devised certain property to S. his grandson, "and if he shall die without issue that property shall return to the E. family; but if he lives to have children he shall have power to make a will of it to his children":—*Held*, that under these words, S. took an estate for life only, and not an estate tail by implication. Eastwood *v.* Avison - - - - 141

EVIDENCE—Ejectment—Defendant's possession
See Mesne Profits. [92

—— Libel—Privileged communication—Malice
See Privileged Communication. [232

—— Libel—Publication - - - 169
See Publication of Libel.

—— Necessaries for infant - - - 32
See Necessaries for Infant.

EXAMINATION OF JUDGMENT DEBTOR—*Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 60—*Body Corporate—Power to Examine Directors.*] The Common Law Procedure Act, 1854, s. 60, enacts that it shall be lawful for any creditor who has obtained a judgment in any of the superior courts to apply to the Court or a judge for a rule or order that the judgment debtor should be orally examined as to any and what debts are owing to him:—*Held* (per Kelly, C.B., Pigott and Cleasby, BB., Channell, B., doubting), that in an action in which a corporation were defendants there was no power under this section to order the oral examination of the directors of that corporation. Dickson *v.* The Neath, &c., Railway Company - - - - - 87

EXECUTION OF CONVEYANCE — Land taken compulsorily - - - 309
See Land taken Compulsorily.

FISHERY — River changing course — Several fishery - - - - 361
See Several Fishery.

FIXTURES - Trade—Mortgage - - 328
See Trade Fixtures.

FRAUDULENT DELIVERY OF GOODS—*Act of Bankruptcy* (12 & 13 *Vict. c.* 106, *s.* 67).] A delivery of goods to be an act of bankruptcy within 12 & 13 Vict. c. 106, s. 67, must pass, or purport to pass, some property or interest in the goods.—*Cotton* v. *James* (1 Moo. & M. 273) followed. Isitt *v.* Beeston - - - 159

FULL AND COMPLETE CARGO—*Charterparty—Freight—"Baltic" printed rates—Cargo of "Oats or other lawful Merchandise."*] By a charterparty the defendant, the charterer, undertook to load at Archangel "a full and complete cargo of oats or other lawful merchandise," and the plaintiffs, the shipowners, to deliver the same on being paid freight as follows:—"4*s.* 6*d.* sterling per 320 lbs. weight delivered, for oats, and if any other cargo be shipped, in full and fair proportion thereto, according to the London Baltic printed rates."—The defendant put on board at Archangel a full and complete cargo of flax, tow, and codilla, being three of the articles mentioned in the Baltic printed rates, and paid to the plaintiffs the freight earned by the goods thus shipped, according to a scale derived from the tables which constitute the Baltic rates. The plaintiffs claimed in addition the difference between this amount and the larger amount which would have been earned by a full and complete cargo of oats:—*Held*, that flax, tow, and codilla being "lawful merchandise" within the meaning of the charterparty, the defendant had fulfilled his contract by loading a full and complete cargo of those articles, and therefore was not, on the true construction of the charterparty, liable for the additional freight claimed by the plaintiffs as upon a full cargo of oats. The Southampton Steam Colliery Company *v.* Clarke - - - - - 73

GAME LAWS—Covenant running with land 20
See Condition Running with Land.

GENERAL HIGHWAY ACT—*s.* 67 - 222
See Nuisances Removal Act, 1855.

GENERAL PILOT ACT - - - 238
See Compulsory Pilotage.

GOODS "LANDED"—Construction—Local Act
See Harbour Tolls. [260

HACKNEY CARRIAGE—*Railway Station—"Public Street or Road"—"Street or Place"—"Plying for Hire"*—1 & 2 *Wm.* 4, *c.* 22, *ss.* 4, 35—16 & 17 *Vict. c.* 33, *s.* 17.] A hackney carriage whilst on the premises of a railway company by their leave for the accommodation of passengers by their trains, is not "plying for hire" in any "street or place" within the meaning of the Hackney Carriage Acts, and the driver of such carriage cannot under those Acts be compelled to convey any person desirous of hiring it.—*Semble* (per Bramwell, B), if the driver consents to be hired, the regulations of the Hackney Carriage Acts as to the amount of fare payable will attach. Case *v.* Storey - - - - - - 319

HARBOUR TOLLS—*Construction—Goods "landed."*] The defendants were empowered by a local Act to levy tolls on all goods *landed* within their harbour. In pursuance of a practice which had continued for many years, stones brought along the coast into the harbour were shot from the plaintiffs' boats on to the shore, below high-water mark, and remained on the spot where they were deposited till they were shipped for exportation from the harbour:—*Held*, that the stones were not *landed* within the meaning of the Act. Harvey *v.* The Mayor, &c., of Lyme Regis - 260

HOUSE—Light and air—Prescription Act—Actual enjoyment - - - - 126
See Light and Air.

IMPLICATION OF LAW—Estate tail—Will—Construction - - - 141
See Estate Tail by Implication.

IMPLIED WARRANTY ON SALE BY SAMPLE—*Warranty of Merchantable Quality.*] The defendants, manufacturers, contracted to supply to the plaintiffs a quantity of grey shirtings according to sample, each piece to weigh 7 lbs. Goods were delivered and accepted according to sample and of the agreed weight; but it was afterwards discovered that the weight was made up by introducing into the fabric 15 per cent. of china clay, which rendered the goods unmerchantable. The presence of the china clay could not be discovered by an ordinary examination of the sample. In an action against the defendants for breach of an implied warranty of merchantable quality:—*Held*, that, in the absence of a sample, a warranty of merchantable quality would have been implied; that the selling by sample excluded that implied warranty only with respect to such matters as could be judged of by the sample, and that the action was therefore maintainable. Nusserwanjee Bomanjee Mody *v.* Gregson - Ex. Ch. 49

INCORPORATION — Lands Clauses Act, 1845 — City of London Sewers Act, 1848 1, 227
See City of London Sewers Act, 1848.

INDORSEMENT—Special—Bill of lading - 58
See Special Indorsement of Bill of Lading.

INFANT—Necessaries—Evidence - - 32
See Necessaries for Infant.

INFRINGEMENT OF RIGHT—*Right of Action without actual Damage—Act done by One in dero-*

INFRINGEMENT OF RIGHT—*continued.*
gation of right of another—Right of Inhabitants of a District to have Water from a Spout in a Highway — Abstraction by Riparian Owner.] The plaintiffs, in common with the other inhabitants of a particular district, enjoyed a customary right at all times to have water from a certain spout in a highway in the district for domestic purposes. The defendant, a riparian owner on the stream whereby the spout was supplied with water, on various occasions prevented such large quantities of water from reaching the spout as to render what remained insufficient for the needs of the inhabitants. The plaintiffs had not themselves ever suffered any actual personal damage or inconvenience:—*Held*, that an action for diverting the water was maintainable without proof of any actual personal damage, inasmuch as the act of the defendant might, if repeated often enough without interruption, furnish evidence in derogation of the plaintiffs' legal rights. HARROP *v.* HIRST - - - - - - - 43

INGRATITUDE—Libel—Explanation - 284
See CHARGE OF INGRATITUDE.

INTEREST IN STOCKS—Charging order - 154
See CHARGING ORDER.

INVITATION—Land—Negligent user - 254
See NEGLIGENT USER OF LAND.

ISSUE—Dying without issue—Will—Construction—Estate tail by implication - 141
See ESTATE TAIL BY IMPLICATION.

JUDGMENT IN EJECTMENT—Evidence—Default - - - - - - 92
See MESNE PROFITS.

LACHES—Presentment of cheque—Delay - 268
See PAYMENT BY CHEQUE.

LAND—Landlord and tenant—Covenant running with land - - - - 20, 311
See CONDITION RUNNING WITH LAND.
COVENANT RUNNING WITH LAND.

—— Negligence—License - - - 254
See NEGLIGENT USER OF LAND.

LAND TAKEN COMPULSORILY—*Execution of Conveyance a condition precedent to Action for Price settled by Award.*] Where, after notice to treat, the amount of compensation to be paid for land compulsorily taken has been fixed by an award under the Lands Clauses Act, 1845, an action for such compensation cannot be maintained until a conveyance of the land has been executed. THE GUARDIANS OF THE EAST LONDON UNION *v.* THE METROPOLITAN RAILWAY COMPANY - 309

"LANDED"—Goods—Construction—Local act
See HARBOUR TOLLS. [260

LANDLORD AND TENANT—Corporation—Common seal—Demise - - - 162
See TENANCY FROM YEAR TO YEAR.

—— Covenant running with land - 20, 311
See CONDITION RUNNING WITH LAND.
COVENANT RUNNING WITH LAND.

LANDS CLAUSES ACT, 1845, s. 68 - - 1, 227
See CITY OF LONDON SEWERS ACT, 1848.

—— s. 133 - - - - - 303
See "PROMOTER: S."

LEGACY DUTY ACT - - - - 345
See SUCCESSION DUTY ACT.

LIABILITY—Money received—Churchwardens.
See CHURCHWARDENS. [63

LIBEL—Charge of ingratitude—Explanation
See CHARGE OF INGRATITUDE. [284

—— Privileged communication—Malice - 232
See PRIVILEGED COMMUNICATION.

—— Publication—Evidence - - 169
See PUBLICATION OF LIBEL.

LICENSE—Land—Negligent user - - 254
See NEGLIGENT USER OF LAND.

LIGHT AND AIR—*Easement—Prescription Act (2 & 3 Wm. 4, c. 71), s. 3—Actual Enjoyment—Unfinished House.*] To acquire a right to the access of light and air by *actual enjoyment*, under 2 & 3 Wm. 4, c. 71, s. 3, it is not necessary that the house should be occupied, or that it should be fit for immediate occupation during the statutory period.—A house was structurally completed, the roof finished, the floors laid, and the windows put in, but it was not internally completed nor fit for habitation. It so remained till within a period of twenty years before action, and was then finished:—*Held*, that the owner was entitled to maintain an action for the obstruction of its windows. COURTAULD *v.* LEGH - - 126

MALICE—Libel—Privileged communication 232
See PRIVILEGED COMMUNICATION.

MARKET—Disturbance—Municipal Corporation Act, s. 8 - - - - 335
See DISTURBANCE OF MARKET.

MASTER AND SERVANT—Master of vessel—Collision—Compulsory pilotage - 238
See COMPULSORY PILOTAGE.

MERCHANT SHIPPING ACT, 1854 - 238
See COMPULSORY PILOTAGE.

MESNE PROFITS—*Evidence—Judgment by default in Ejectment—Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), ss. 168, 170—Rule 112, Hilary Term, 1853—Evidence of Defendant's Possession—Pleading—Costs of Ejectment—Practice in Ejectment.*] In an action of trespass for mesne profits the plaintiffs proved that the defendant had had a lease of the premises (which was not produced), and that he had paid a yearly rent of 327*l.* 10*s.*, but when or for how long did not appear. They also gave in evidence a judgment by default in a previous action of ejectment for the same premises. By the writ in the ejectment, which was dated the 5th of February, 1868, they had claimed title as from the 28th of March, 1867:—*Held* (per Kelly, C.B., Channell, Pigott, and Cleasby, BB.), that upon this evidence it sufficiently appeared that the defendant was tenant in possession of the premises at the date of the writ of ejectment, and that the plaintiffs were therefore entitled to mesne profits from that time up to the time of their obtaining possession of the premises.—Per Kelly, C.B., the judgment by default in the ejectment, taken alone, is no evidence of the defendant's possession of the premises at any time; neither for the period during which the plaintiffs claim title in the writ, nor at the date of the writ itself: *Ive* v. *Scott* (9 Dowl. 993) commented on.—Per Channell and Cleasby,

MESNE PROFITS—*continued.*
BB., the judgment by default in the ejectment is primâ facie evidence that the defendant was in possession at the date of the writ, but is not evidence of his possession for the period during which the plaintiffs claim title in the writ.—The plaintiffs in their declaration alleged that they had "incurred great expense in recovering possession" of their land:—*Held*, that under these words they were entitled to recover the costs of the previous action of ejectment. Pearse *v.* Coaker - 92

MINISTER'S STIPEND—Churchwardens—Payment out of pew rents - - 63
See Churchwardens.

MISTAKE—*Action for Money had and received—Valuation—Award.*] By agreement between the outgoing tenant of a farm (the defendant) and the incoming tenant (the plaintiff), the amount to be paid by the plaintiff to the defendant was referred to two valuers, who made their valuation. A promissory note for the amount of the valuation (after deducting 2000*l.* paid on account) was given by the plaintiff to the defendant; and the plaintiff entered into possession. On the occasion of his selling his interest in the farm to a third person, the plaintiff discovered that errors had been made in the former valuation, by including items that ought not by the custom of the country to have been valued to him, and items that did not exist. He nevertheless paid the promissory note at maturity without objection. Afterwards, without having given the defendant any information as to the nature of his complaint of the valuation, and without having made any demand, he brought this action for money had and received:—*Held*, by the Court, that the plaintiff could not recover.—By Kelly, C.B., and Martin and Pigott, BB., that the valuers' award was final between the parties.—By Kelly, C.B., and Martin, B., that the conduct of the plaintiff had made it impossible to restore the parties to their original condition or to do justice between them, and that therefore the plaintiff could not maintain an action for money had and received.—By Martin and Bramwell, BB., that to enable a plaintiff to maintain an action for money paid by mistake, as money had and received by the defendant, notice of the mistake must have been given to the defendant and a demand made. Freeman *v.* Jeffries - - - - 189

MONEY HAD AND RECEIVED—Mistake—Award
See Mistake. [189

MORTGAGE—Trade fixtures - - 328
See Trade Fixtures.

MUNICIPAL CORPORATION ACT, s. 8 - 335
See Disturbance of Market.

NECESSARIES FOR INFANT—*Province of Judge and Jury—Evidence.*] Where to a plea of infancy, in an action for goods supplied, the plaintiff replies that they were necessaries, the question of "necessaries" or "not necessaries" is one of fact, and therefore for the jury. But, like all other questions of fact, it should not be left to the jury by the judge, unless there is evidence on which they can reasonably find in the affirmative.—The plaintiff sued the defendant, a minor, for the price of a pair of jewelled solitaires worth 25*l.*, and of an antique goblet worth 15*l.* 15*s.*, which the plaintiff knew, when he supplied it, was intended for a present. The defendant was the son of a baronet, with no independent establishment, and in the receipt of an allowance of 500*l.* a year. The question whether these articles were necessaries or not was left to the jury, who found that they were, and a verdict for the plaintiff for 40*l.* 15*s.* was accordingly entered. The Court of Exchequer subsequently held, first (Kelly, C.B., doubting), that there was no evidence for the jury of the goblet being a necessary, and that therefore the verdict ought to be reduced by its price; and, secondly (Bramwell, B., dissenting), that there was evidence which was properly left to the jury, and from which they might fairly conclude that the solitaires were necessaries:—*Held* (reversing on the second point the judgment of the Court below), that there was no evidence of either article being a necessary, and that a nonsuit ought to have been directed.—*Quære*, whether on the trial of an action for goods sold and delivered, where issue is taken on a replication of necessaries to a plea of infancy, evidence is admissible on the part of the defendant to prove that when the goods were supplied to him he was already sufficiently provided, but not to the knowledge of the plaintiff, with other goods of a similar description. Ryder *v.* Wombwell - - - - 32

NEGLIGENCE—Collision—Compulsory pilotage
See Compulsory Pilotage. [238

—— Land—Licensee - - - - 254
See Negligent User of Land.

—— Railway company—Train too long for platform - - - - - 117
See Train too Long for Platform.

NEGLIGENT USER OF LAND—*Licensee—Invitation—Customer.*] At the defendants' station at C. it was the habit to unload coal wagons by shunting them and tipping the coal into cells; it was also the practice for the consignees of the coal, or their servants, to assist in the unloading, and for that purpose to go along a flagged path by the side of the wagons. The plaintiff was consignee of a coal wagon, which could not be unloaded in the usual way on account of all the cells being occupied. With the permission of the station master, he went to his wagon, which was shunted in the usual place, took some coal from the top of the wagon, and descended on to the flagged path. The flag he stepped on gave way, and he fell into one of the cells and was injured:—*Held*, that, although not getting his coal in the usual mode, the plaintiff was not a mere licensee, but was engaged, with the consent and invitation of the defendants, in a transaction of common interest to both parties, and was therefore entitled to require that the defendants' premises should be in a reasonably secure condition. Holmes *v.* The North Eastern Railway Company - 254

NO EFFECTS—Notice of dishonour—Cheque 313
See Notice of Dishonour.

NONSUIT—Rule to set aside—Practice - 152
See Rule to Set Aside Nonsuit.

NOTICE OF DISHONOUR—*Cheque—No Effects—Reasonable Expectation of Cheque being Paid.*] In an action by the holder against the drawer of a dishonoured cheque, notice of dishonour is ex-

NOTICE OF DISHONOUR—*continued.*
cused by want of effects at the time when the drawer would reasonably expect the cheque to be presented for payment, provided the drawer had no reasonable expectation that it would be paid. —The want of effects which will excuse notice of dishonour need not be a want of any effects; it is sufficient if there are no effects sufficient for the payment of the cheque. Carew *v.* Duckworth - - - - - - - 313

NUISANCES REMOVAL ACT, 1855 (18 & 19 *Vict. c.* 121), *s.* 22—*Sewers—Construction—Local Act and General Act—Compensation—General Highway Act* (5 & 6 *Wm.* 4, *c.* 50), *s.* 67.] The defendants were commissioners under a local Act, which empowered them to make drains through private enclosed lands, after giving twenty-eight days' public notice, with power to persons interested to object and to appeal. The defendants were also, as such commissioners, by s. 3 of the Nuisances Removal Act, 1855, the local authority; and as the local authority, were, by s. 22 of the same Act, and by s. 67 of the General Highway Act, empowered, without giving notice, to make drains through private enclosed lands adjoining a highway, for the purpose of removing an existing nuisance. A watercourse used as a sewer being a nuisance, and a new sewer being necessary to remove the nuisance, the defendants, without giving notice, made a new sewer through the plaintiff's enclosed land adjoining a highway, not in the line of the watercourse:—*Held* (reversing the decision of the Court below), that the defendants were entitled to act under either the local Act or the general Act, at their election; and that the making of the sewer in that manner was within their powers under the general Act.—S. 22 of the Nuisances Removal Act, 1855, construed with s. 67 of the General Highway Act, empowers the local authority, where a new sewer is necessary, to make the same in any direction they think fit through private enclosed lands adjoining a highway, although no sewer previously existed there.—The same sections provide compensation for damage caused by the making of such a sewer, to the owner or occupier of the land through which the same is made. Earl of Derby *v.* The Bury Improvement Commissioners - - - **Ex. Ch. 222**

"OATS AND OTHER LAWFUL MERCHANDIZE" —Charterparty - - - - - 73
See Full and Complete Cargo.

PAYMENT — Pew rents — Minister's stipend — Churchwardens - - - 63
See Churchwardens.

PAYMENT BY CHEQUE—*Presentment of Cheque —Delay—Laches.*] A creditor who takes from his debtor's agent on account of the debt the cheque of the agent, is bound to present it for payment within a reasonable time; and if he fails to do so, and by his delay alters for the worse the position of the debtor, the debtor is discharged, although he was not a party to the cheque. Hopkins *v.* Ware - - - - - - - 268

PAYMENT ON DEMAND—*Bill of Sale—Reasonable Time—Damages.*] To secure a floating balance, the plaintiff conveyed to the defendants by bill of sale the machinery, &c., in and upon the plaintiff's mill; the bill of sale contained a proviso for redemption if the plaintiff should *instantly on demand, and without delay on any pretence whatsoever*, pay the sum due; it provided that the demand might be made personally on the plaintiff, *or by giving or leaving verbal or written notice to or for him* at his place of business, &c., so nevertheless that a demand be in fact made; that on default of payment the defendants might enter, and seize, and sell, but that until default the plaintiff should remain in possession.—In the plaintiff's absence from his place of business, a demand was made there by the defendants upon his son, who stated his inability to meet it; and the defendants immediately seized:—*Held*, that the notice required by the deed in case of the plaintiff's absence was such a notice as might be reasonably supposed to reach the plaintiff, and to give him an opportunity of complying with it within a reasonable time; and that the seizure was, therefore, not justified. Massey *v.* Sladen 13

PENALTIES—Application—Borough justices
See Application of Penalties. [292

PETITION OF APPEAL—Right to begin - 327
See Right to Begin.

PILOTAGE, COMPULSORY: *See* Compulsory Pilotage.

PLEADING—Ejectment—Evidence - 92
See Mesne Profits.

"PLYING FOR HIRE" — Hackney carriage— Railway station—Public place - 319
See Hackney Carriage.

POOR-RATE—Lands Clauses Act, 1845, s. 133— "Promoters." - - - 303
See "Promoters."

PORT OF LONDON—Collision—Compulsory pilotage - - - - - - 238
See Compulsory Pilotage.

PRACTICE—Case stated by arbitrator—Error 187
See Case stated by Arbitrator.

—— Conversion—Succession duty—Legacy duty
See Succession Duty Act. [345

—— Costs—Ejectment - - - 92
See Mesne Profits.

—— Necessaries for infant—Province of judge and jury - - - - - - 32
See Necessaries for Infant.

—— Right to begin — Summons under Succession Duty Act, 1853 - - 327
See Right to Begin.

—— Rule to set aside nonsuit - - 152
See Rule to set aside Nonsuit.

PRESCRIPTION — Private chapel — Ownership— Evidence - - - - 273
See Private Chapel.

PRESCRIPTION ACT, s. 3 - - - 126
See Light and Air.

PRESENTMENT OF CHEQUE—Duty—Laches 268
See Payment by Cheque.

PRESUMPTION — Will — Construction — Estate tail by implication - - - 141
See Estate Tail by Implication.

PRINCIPAL AND AGENT — Creditors' deed — Signature—Assents - - 107
See Assents to Creditors' Deed.

PRINCIPAL AND AGENT—*continued.*

—— Publication of libel—Evidence - 169
See Publication of Libel.

—— Sale of shares—Custom of Stock Exchange [81, 203, 373
See Custom of Stock Exchange. 1, 2, 3.

—— Signature — Promissory note — "As secretary" - - - - - 102
See Signature in Representative Character.

PRIVATE CHAPEL—*Chapel part of Parish Church —Pews—Great and lesser Chancels—Freehold of Inheritance — Immemorial User — Reparation — Prescription — Evidence.*] The freehold of a chapel or lesser chancel may be vested in a private person, though such chapel or chancel forms an integral portion of, and is under the same roof with, a parish church. The enjoyment of such a chapel or chancel, and the right to its exclusive use, is not necessarily annexed to a dwelling-house.—Immemorial repair of a chapel or lesser chancel which is part of a parish church, coupled with other acts of ownership, is evidence of a freehold of inheritance in it being vested in those who have executed the repairs and exercised the acts of ownership. Chapman *v.* Jones - 273

PRIVILEGE FROM ARREST—*Accused Person appearing on his Recognizances at the Hearing of the Charge against himself.*] An accused person, who attends under his recognizances at the hearing of the charge against himself, is privileged from arrest on civil process during his return home.—The defendant was charged with embezzlement before a police magistrate; after several hearings he was remanded on bail; he afterwards attended at a further hearing on his recognizances, and as he was leaving Court after a further remand he was arrested on a ca. sa. at the suit of the plaintiff:—*Held*, that he was entitled to be discharged. —*Semble*, any person whose presence is necessary to the administration of public justice, and on whose will it depends whether he shall or shall not attend, is privileged from arrest on civil process, eundo, morando, et redeundo. — *Hare* v. *Hyde* (16 Q. B. 394; 20 L. J. (Q.B.) 185) distinguished. Gilpin *v.* Cohen - - - - 131

PRIVILEGED COMMUNICATION—*Libel—Actual Malice—Evidence for the Jury.*] Libellous expressions used in a privileged communication may be evidence of actual malice for the jury; but if, taken in connection with admitted facts, they are such as might have been used honestly and bonâ fide by the defendant, the judge may withdraw the case from the jury and direct a verdict for the defendant.—The defendant, in a privileged communication, described the conduct of the plaintiff "as most disgraceful and dishonest." The conduct so described was of an equivocal nature, and might honestly and bonâ fide be supposed by the defendant to be such as he described it:—*Held*, that, implied malice being negatived by the privilege, there was no evidence of actual malice, and that a verdict for the defendant was properly directed by the judge at the trial. Spill *v.* Maule - - Ex. Ch. 232

PROBATE DUTY—*Wills Act* (7 *Wm.* 4, *c.* 1 *Vict. c.* 26), *s.* 33—55 *Geo.* 3, *c.* 184, *Sch. part* 3—*Decease of Legatee, leaving issue, in the lifetime of Testator.*] A testator bequeathed his personal estate to his son, who died in his father's lifetime, leaving issue:—*Held*, that the executors of the son were chargeable with probate duty on the amount of the bequest, in the same manner as they would have been had the son actually survived the father. The Executors of Perry *v.* The Queen - - - - - 27

PROMISSORY NOTE—Signature—Representative character - - - - 102
See Signature in Representative Character.

"**PROMOTERS**"—*Lands Clauses Act*, 1845 (8 *Vict. c.* 18), *s.* 133 — *Poor-rate.*] The Metropolitan Board of Works are "promoters" within s. 133 of the Lands Clauses Act, 1845, and may be liable to an action in respect of any deficiency in the poor-rate caused during the construction of their works by their acquisition of rateable land in a parish.—*Semble*, persons intrusted with the construction of public works under Acts which incorporate the Lands Clauses Act, 1845, are, in the absence of special circumstances, "promoters" within s. 133 of that Act.—S. 133 applies, if it appears that the works, when constructed, may, in part or in whole, be the subject of beneficial occupation.—*Quære*, whether it would apply in a case where it appeared that the works, when completed, could not be the subject of beneficial occupation. Wheeler *v.* The Metropolitan Board of Works - - - - 303

PROTECTION—Execution—Creditors' deed—Registration - - .. - 331
See Deed Pleadable not Pleaded.

"**PUBLIC STREET OR ROAD**"—Hackney carriage—Railway station - - 319
See Hackney Carriage.

PUBLICATION OF LIBEL—*Distinction between Civil and Criminal Proceedings — Liability of Principal for Agent's Acts—Evidence.*] The defendant P. was chairman of, and the other defendant E. was present at, a meeting of a board of guardians on an occasion when there was a discussion concerning the plaintiff's conduct, in the course of which defamatory statements concerning him were made. Reporters for the local press attended the meeting in the ordinary discharge of their duty. The defendant E., during the proceedings, said "he hoped the local press would take notice of this very scandalous case," and requested the chairman to give an outline of it. The defendant P. complied, and in the course of his statement said, "I am glad gentlemen of the press are in the room, and I hope they will take notice of it." The defendant E. added, "and so do I." The defendant P. further expressed a hope that publicity would be given to the matter. A correct but condensed summary of the proceedings, containing matter defamatory to the plaintiff, was afterwards inserted in two local newspapers. An action of libel was thereupon brought against the defendants. The declaration, to which the general issue was pleaded, charged them in two counts with publishing the reports in question, which were set out verbatim. The judge at the trial directed a verdict to be entered for the defendants, being of opinion that there

PUBLICATION OF LIBEL—*continued.*
was no evidence for the jury of the publication by the defendants of the libels complained of. On the argument of a bill of exceptions tendered to this ruling:—*Held* (by Keating, Montague Smith, and Hannen, JJ., Byles and Mellor, JJ., dissenting), a misdirection.—By Montague Smith, Keating, and Hannen, JJ. Where a man makes a request to another to publish defamatory matter, of which for the purpose he gives him a statement, whether in full or in outline, and the agent publishes that matter, adhering to the sense and substance of it, although the language be to some extent his own, the man making the request is liable to an action as the publisher.—By Byles, J. There is a great difference between the authority which will make a man liable criminally for the acts of his agent, and that which will make him liable civilly. A principal is not civilly liable unless the agent's authority be by the agent duly pursued, but the principal may be criminally liable, though the agent have deviated very widely from his authority.—*Reg.* v. *Cooper* (8 Q. B. 533) commented on. PARKES *v.* PRESCOTT **Ex. Ch. 169**

QUALITY—Warranty—Sale of goods by sample—Implication of law - - - **49**
See IMPLIED WARRANTY ON SALE BY SAMPLE.

RAILWAY COMPANY—Negligence — Train too long for platform - - - **117**
See TRAIN TOO LONG FOR PLATFORM.

RAILWAY STATION — Hackney carriage — "Public street or road" - - **319**
See HACKNEY CARRIAGE.

REASONABLE TIME — Payment on demand—Bill of sale - - - - **13**
See PAYMENT ON DEMAND.

RECOGNIZANCE—Appearance at hearing—Privilege from arrest - - - **131**
See PRIVILEGE FROM ARREST.

REGISTRATION—Creditors' deed—Execution
See DEED PLEADABLE NOT PLEADED. **[331**

REVERSION—Assignee—Covenant running with land - - - - **20, 311**
See CONDITION RUNNING WITH LAND.
COVENANT RUNNING WITH LAND.

RIGHT TO BEGIN—*Summons under Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51)—*Petition of Appeal—Legacy Duty Acts.*] Petition of appeal under the Succession Duty Act, 1853, s. 50, against an assessment made by the Inland Revenue Commissioners on the petitioner in respect of a succession alleged to accrue to him under a will.—The petitioner admitted that some duty was payable.—The only question was as to the amount that was payable:—*Held*, that the petitioner had the right to begin. *In re* GREENWOOD **[327**

RIVER CHANGING ITS COURSE—Several fishery
See SEVERAL FISHERY. **[361**

RULE 112 OF HILARY TERM, 1853 - **92**
See MESNE PROFITS.

RULE TO SET ASIDE NONSUIT—*Power of Defendant to object to Verdict being entered for Plaintiff on the Ground that it would be against the Evidence—Notice.*] On the argument of a rule to set aside a nonsuit on the ground that upon certain findings of the jury the verdict should have been entered for the plaintiff, the defendant may show that the verdict, if so entered, would be against the weight of evidence, although he may not have informed the Court within the first four days of the term succeeding the trial of his intention to raise such an objection. WALKER *v.* CORY **[152**

RULE TO SET ASIDE NONSUIT—*continued.*

SALE OF GOODS—Sample—Implied warranty **49**
See IMPLIED WARRANTY ON SALE BY SAMPLE.

SALE OF SHARES—Custom of Stock Exchange **[81, 203, 373**
See CUSTOM OF STOCK EXCHANGE. 1, 2, 3.

SET-OFF—Assignment of debentures—Company
See ASSIGNMENT OF DEBENTURES. **[387**

SEVERAL FISHERY—*Tidal River—River changing Course—Following Fishery—New Channel—Disturbance of Fishery.*] A several fishery in a tidal river, the waters of which have permanently receded from one channel, and flow in another, cannot be followed from the old to the new channel. THE MAYOR, &c., OF CARLISLE *v.* GRAHAM **361**

SEWERS—Nuisances Removal Act, 1855—Construction - - - - **222**
See NUISANCES REMOVAL ACT, 1855.

SHARES—Charging order - - - **154**
See CHARGING ORDER.
—— Sale—Custom of Stock Exchange **[81, 203, 373**
See CUSTOM OF STOCK EXCHANGE. 1, 2, 3.

SHERIFF—Creditors' deed pleadable not pleaded—Execution - - - - **331**
See DEED PLEADABLE NOT PLEADED.

SIGNATURE—Creditors' deed—Agent's authority—Assents - - - - **107**
See ASSENTS TO CREDITORS' DEED.
—— Promissory note—Representative character **[102**
See SIGNATURE IN REPRESENTATIVE CHARACTER.

SIGNATURE IN REPRESENTATIVE CHARACTER—*Promissory Note—Note Signed "as Secretary" of an Incorporated Company — Personal Liability of Maker.*] The following promissory note was signed by the secretary of an incorporated company:—"1500*l.* On demand I promise to pay Messrs. Alexander and Co., or order, the sum of one thousand five hundred pounds, with legal interest thereon until paid, value received the 16th of August, 1865. For Mistley, Thorpe, and Walton Railway Company.—John Sizer, secretary." In an action on the note by the payees against the secretary:—*Held* (per Kelly, C.B., and Pigott, B., Cleasby, B., hesitating), that he was not personally liable. ALEXANDER *v.* SIZER **[102**

SLANDER—Costs—Damages not exceeding 10*l.*
See DAMAGES NOT EXCEEDING 10*l.* **[146**

SPECIAL INDORSEMENT OF BILL OF LADING—*Discharge of Consignee from Liability—Acquiescence—Acceptance of Contract.*] The consignee named in a bill of lading being sued for freight, pleaded that he indorsed the bill before arrival of

SPECIAL INDORSEMENT OF BILL OF LADING —*continued.*

the ship in the words "Deliver to W. & K. or order, looking to them for all freight, dead freight, and demurrage, without recourse to us;" and that the plaintiffs accepted the indorsement, and in pursuance of it delivered the goods to W. & K., and not to the defendant. At the trial it was admitted that the defendant would have been liable to W. & K. for any freight paid by them. There was a conflict of evidence as to whether the indorsement was or was not on the bill when it was shewn to the captain, but the captain swore he did not see it. The learned judge directed the jury that it was immaterial whether the indorsement was or was not on the bill unless the captain saw it, and that the onus lay on the defendant of proving that the captain saw and assented to it. The jury found a verdict for the plaintiffs; and the defendant obtained a rule for a new trial on the ground of misdirection, which was discharged:—*Held* (affirming the judgment of the Court below), that the defendant having been at the time of the alleged indorsement liable for the freight, and admitting that he still remained substantially liable, he was bound to prove an assent on the part of the plaintiffs discharging him from that liability, and that assent would not be proved by shewing that the indorsement was on the bill when it was presented to the captain, without proving that the captain in fact assented to it. Lewis *v.* M'Kee - - - - 58

STATUTES:

32 Hen. 8, c. 34 - - - - 20
See Condition Running with Land.

36 Geo. 3, c. 52 - - - - 345
See Succession Duty Act.

55 Geo. 3, c. 184 - - - - 345
See Succession Duty Act.

————, sch. pt. 3 - - 27
See Probate Duty.

58 Geo. 3, c. 45, s. 73 - - - 63
See Churchwardens.

59 Geo. 3, c. 134, s. 26 - - - 63
See Churchwardens.

6 Geo. 4, c. 125 - - - - 238
See Compulsory Pilotage.

9 Geo. 4, c. 61, s. 26 - - - 292
See Application of Penalties.

1 & 2 Wm. 4, c. 22, ss. 4, 35 - - 319
See Hackney Carriage.

2 & 3 Wm. 4, c. 71, s 3 - - - 126
See Light and Air.

5 & 6 Wm 4, c. 50, s. 67 - - - 222
See Nuisances Removal Act, 1855.

5 & 6 Wm. 4, c. 76, s. 8 - - - 335
See Disturbance of Market.

7 Wm. 4 and 1 Vict. c. 26, s. 33 - - 27
See Probate Duty.

1 & 2 Vict. c. 110, s. 14 - - - 154
See Charging Order.

3 & 4 Vict. c. 82, s. 1 - - - 154
See Charging Order.

8 Vict. c. 18, s. 68 - - - 5, 227
See City of London Sewers Act, 1848.

STATUTES—*continued.*

8 Vict. c. 18, s. 133 - - - 303
See "Promoters."

11 & 12 Vict. c. 43, s. 31 - - - 292
See Application of Penalties.

11 & 12 Vict. c. clxiii. - - 5, 227
See City of London Sewers Act, 1848.

12 & 13 Vict. c. 106, s. 67 - - - 159
See Fraudulent Delivery of Goods.

15 & 16 Vict. c. 76, ss. 168, 170 - - 92
See Mesne Profits.

16 & 17 Vict. c. 33, s. 17 - - - 319
See Hackney Carriage.

16 & 17 Vict. c. 51 - - - 327, 345
See Right to Begin.
Succession Duty Act.

17 & 18 Vict. c. 36, ss. 1, 7 - - 107
See Assents to Creditors' Deed.

17 & 18 Vict. c. 104 - - - 238
See Compulsory Pilotage.

17 & 18 Vict. c. 125, s. 60 - - - 87
See Examination of Judgment Debtor.

18 & 19 Vict. c. 121, s. 22 - - - 222
See Nuisances Removal Act, 1855.

24 & 25 Vict. c. 75, s. 4 - - - 292
See Application of Penalties.

24 & 25 Vict. c. 134, s. 192 - 9, 107
See Assents to Creditors' Deed.
Equitable Plea of Creditors' Deed.

————, ss. 192, 198 - 80, 331
See Application quia timet.
Deed Pleadable not Pleaded.

30 & 31 Vict. c. 142, s. 5 - - - 146
See Damages not exceeding 10*l.*

STAYING PROCEEDINGS—Process—Creditors' Deed - - - - - 80
See Application quia timet.

STIPEND OF MINISTER—Churchwardens—Payment out of pew-rents - - 63
See Churchwardens.

STOCK AND SHARES—Charging order - 154
See Charging Order.

STOCK EXCHANGE—Custom—Sale of shares 81, 203, 373
See Custom of Stock Exchange. 1, 2, 3.

"STREET OR PLACE"—Hackney carriage—Railway station - - - - 319
See Hackney Carriage.

SUCCESSION DUTY ACT, 1853 (16 & 17 *Vict. c.* 51) —*Legacy Duty Act* (36 *Geo.* 3, *c.* 52)—55 *Geo.* 3, *c.* 184—*Money to be laid out in Land—Conversion—Practice.*] By a will, dated in November, 1799, J. De L. gave to trustees 10,000*l.* consols, and certain other sums, upon trust that they should lay out both principal and interest in the purchase of land, to be conveyed to the use of Charles De L., his eldest son, for life; remainder to trustees, to preserve, &c.; remainder to the first and other sons of Charles De L. and the heirs male of their bodies successively in tail male, and in default of such issue to the use of James De L., another son of the testator, for life, with similar remainders; remainder to the testator's own right heirs. The testator died on the 8th of April, 1800, leaving his two sons, Charles and James, and one daughter,

SUCCESSION DUTY ACT, 1853—*continued.*

Susanna, him surviving. The moneys directed to be laid out in land were never so laid out, and Charles during his life received the dividends upon the whole "real estate fund." In 1840 he died a bachelor and intestate, whereupon the dividends were paid to James up to May, 1857, when he also died a bachelor and intestate. Susanna De L. then became the only lineal descendant and heir at law of the testator. She died in April, 1866, unmarried and intestate, having refused during her lifetime to receive either dividends or principal of the money left under her father's will. Shortly afterwards, the "real estate fund" was paid into the Court of Chancery in an administration suit, and eventually was directed to be paid out to the petitioner, who was a grandson of a brother of the testator, and heir at law of Susanna De L.—The Commissioners of Inland Revenue required the petitioner to pay succession duty on the "real estate fund" at the rate of 5 per cent. under the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 10, on the ground of the same being a succession to him derived from Susanna De L., as the "predecessor."—On appeal against this assessment:—*Held*, per Kelly, C.B., and Channell, B., that duty was not payable under the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), but under the Legacy Duty Act (36 Geo. 2, c. 52). —Per Bramwell and Cleasby, BB., that duty was payable under the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), as on a succession from Susanna De L., as the "predecessor."—*Semble*, per Bramwell, B., under whichever Act duty was payable, the amount charged by the commissioners was correct, Charles De L., James De L., and Susanna De L., having all died after 55 Geo. 3, c. 184, came into force.—Per Kelly, C.B. The doctrine of the court of equity, that money directed to be laid out in land is land, does not extend to the interpretation of statutes imposing duties on personal estate. *In the Matter of* De Lancey's Succession - 345

SUMMONS UNDER SUCCESSION DUTY ACT—Right to begin - - - 327
See Right to Begin.

SUPPORT FROM SUBTERRANEAN WATER—*Conveyance of Land for Building Purposes—Derogation from Grant—Covenant to Build to secure Rent.*] An owner of land has no right at common law to the support of subterranean water.—*Semble*: —One, who by draining his own land withdraws from an adjoining owner, claiming under the same grantor, the support of water theretofore beneath the land of that owner, and thereby causes the surface of that land to subside, is not liable for the injury inflicted, unless the act of draining is absolutely in derogation of the special purpose for which the land was originally granted to the adjoining owner.—A deed of conveyance of land for building purposes contained a covenant by the grantee to build to secure the rent reserved:—*Held*, that the adjoining owner who claimed under the same grantor, was, nevertheless at liberty to drain his own land, although the result of his doing so was to cause a subsidence in the surface of the land of the first grantee.—The owner of a piece of land, close to Manchester, granted it in fee in 1835, to S. H. for building purposes, subject to a chief rent. S. H. in April, 1864, granted

SUPPORT FROM SUBTERRANEAN WATER—*continued.*

a portion of it, which was of a wet and spongy character, to C. in fee for similar purposes, subject to a similar rent. In the same month C. mortgaged this portion to the plaintiff, who entered into possession. The original deed of conveyance from the owner to S. H. and also that from S. H. to C., contained covenants by the grantees respectively to build a sufficient number of messuages to secure the rent reserved. Some cottages were afterwards built by the plaintiff on his portion of the land, but before their erection nothing had been done with the land, either by draining or otherwise, to make it more suitable to bear the weight of the cottages. In June, 1864, S. H. conveyed the adjoining land, being the other portion of the land originally granted to him in 1835, to E., and by successive conveyances it subsequently became vested in certain trustees for the purpose of erecting a church thereon. The defendant was the builder employed by them to carry out this object. In order to secure the safety of the church, it was necessary for the defendant to excavate deeply, and during the progress, and in consequence of this operation, the wet and spongy land on which the plaintiff's cottages were erected was drained and subsided, and the cottages were cracked and injured. The land would have subsided even if no buildings had been erected on it. In an action by the plaintiff to recover damages for these injuries:—*Held* (affirming the judgment of the Court below), that he was not entitled to recover. Popplewell *v.* Hodkinson - - 248

TENANCY FROM YEAR TO YEAR—*Corporation—Common Seal—Landlord and Tenant—Demise for a Term of Years.*] One who enters upon, occupies, and pays rent for corporate property under a demise for a term of years, made on behalf of the corporation, but not sealed with their common seal, becomes tenant from year to year of the corporation, on such terms of the demise as are applicable to a yearly tenancy.—*Wood* v. *Tate* (2 B. & P. (N. R.) 247), followed.—*Semble*, per Kelly, C.B., that when an individual contracts with a corporation in such a manner that the contract, though not under seal, may be enforced in equity against them, the individual is bound at law by any stipulation by him, which is made in consideration of the liability so imposed upon them. The Ecclesiastical Commissioners *v.* Merral - 162

TENANT: *See* Landlord and Tenant.

TIDAL RIVER—Several fishery—River changing course - - - - 361
See Several Fishery.

TIME—Payment on demand—Bill of sale - 13
See Payment on Demand.

TOLLS—Harbour—Construction—Goods "landed" *See* Harbour Tolls. [260

TRADE FIXTURES—*Mortgage.*] Trade fixtures which have been annexed to the freehold for the more convenient using of them, and not to improve the inheritance, and which are capable of being removed without any appreciable damage to the freehold, pass under a mortgage of the freehold to the mortgagee. Climie *v.* Wood [Ex. Ch. 328

TRAIN—Negligence—Train too long for platform *See* Train too Long for Platform. [117

TRAIN TOO LONG FOR PLATFORM—*Negligence—Railway Company.*] An excursion train in which the plaintiffs (husband and wife) were passengers to Rhyl, arrived at Rhyl station and, the train being too long for the platform, the carriage in which they were overshot it. It was then daylight. The passengers were not warned to keep their seats, nor was any offer made to back the train to the platform; nor was it in fact so backed; nor did it move until it started for Bangor. After waiting a short time the husband, following the example of other passengers, alighted, without any request to the defendants' servants to back the train or any communication with them. The wife, standing on the iron step of the carriage, took both his hands and jumped down, and in doing so strained her knee. There was a footboard between the iron step and the ground which she did not use, but there was no evidence of any carelessness or awkwardness on her part in the manner of descent. In an action brought for the injury:—*Held* (per Byles, Mellor, Montague Smith, and Hannen, JJ., Keating, J., dissenting), affirming the decision of the Court below, that there was no evidence for the jury of negligence in the defendants, and that the accident was entirely the result of the plaintiffs' own acts.—*Foy* v. *London, Brighton, and South Coast Railway Company* (18 C. B. (N.S.) 225) commented on. Siner and Wife *v.* The Great Western Railway Company [117

TRUSTEE—Minister's stipend—Payment out of pew rents - - - - 63
See Churchwardens.

USAGE OF STOCK EXCHANGE: *See* Custom of Stock Exchange.

VALUATION—Money had and received—Mistake - - - - - 189
See Mistake.

WARRANTY—Sale of goods by sample—Implication of law - - - - - 49
See Implied Warranty on Sale by Sample.

WATER—Abstraction—Infringement of right—Damage - - - - - 43
See Infringement of Right.

—— Support of land—Conveyance of land—Derogation from grant - - 248
See Support from Subterranean Water.

WILL—Construction—Estate tail by implication
See Estate Tail by Implication. [141

WILLS ACT, s. 33—Probate duty - - 27
See Probate Duty.

WORDS—"As secretary" - - - 102
See Signature in Representative Character.

—— "Landed" - - - - 260
See Harbour Tolls.

—— "Oats or other lawful merchandise" 73
See Full and Complete Cargo.

—— "Plying for hire" - - - 319
See Hackney Carriage.

—— "Promoters" - - - - 303
See "Promoters."

—— "Public street or road" - - 319
See Hackney Carriage.

—— "Street or place" - - - 319
See Hackney Carriage.

*** For Regulæ Generales under the Judgments Extension Act, 1868, See Law Rep. 4 Q. B. 739.

END OF VOL. IV.

BIBL. LONDIN UNIV.

LONDON:
PRINTED BY WILLIAM CLOWES AND SONS, STAMFORD STREET
AND CHARING CROSS